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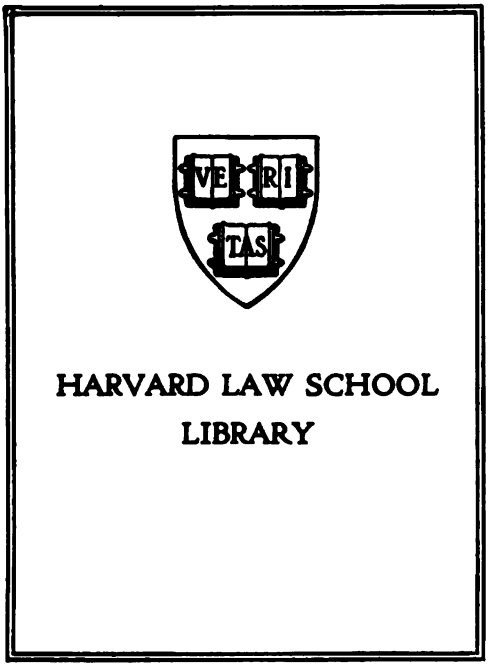
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CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

APRIL 1898 — AUGUST 1898

GEORGE F. TUCKER

REPORTER

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OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

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HON. OLIVER WENDELL HOLMES.
HON. MARCUS P. KNOWLTON.
HON. JAMES M. MORTON.
HON. JOHN LATHROP.
HON. JAMES M. BARKER.

ATTORNEY GENERAL.

HON. HOSEA M. KNOWLTON.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

SOLOMON BANEWUR & another *vs.* JOHN LEVENSON.

Suffolk. March 24, 25, 1897. — April 12, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Breach of Contract to loan Money — Damages.

At the trial of an action to recover damages for breach of an agreement to pay the plaintiffs' debts and relieve their property from attachment, there was evidence tending to show that the plaintiffs, who were copartners and owing $2,400 which they were unable to pay, had a stock in trade subject to a mortgage and under attachment; that most of their creditors were willing to release them from their debts upon receiving 33⅓ per cent of their claims; that, a disagreement having arisen between the plaintiffs, friends were called in, including the defendant, who arranged in writing a plan of settlement which stipulated certain things that the plaintiffs and the defendant respectively should do, and which was assented to by the plaintiffs and signed both by them and by the defendant; that thereupon the defendant orally agreed to furnish $800 for settlement with the plaintiffs' creditors and $100 for expenses, in return for which he was, upon the release of the attachments, to have possession of the plaintiffs' stock of goods until he should be reimbursed the sum of $900 and be paid $100 for his services; that soon after this agreement the defendant gave to the plaintiffs' first attaching creditor his covenant to pay all the plaintiffs' creditors the percentage of their respective claims and the legal expenses, that some weeks later the plaintiffs and the defendant signed an indenture, under seal, in which the plaintiffs were party of the first part, the defendant party of the second part,

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and the creditors party of the third part, purporting to convey all the plaintiffs' property to the defendant, in trust to reduce it to money, pay preferred claims and distribute the rest ratably among the creditors, and to release the plaintiffs from their debts, but no creditor ever assented to it; that thereafter the defendant, although he furnished no money to pay the plaintiffs' creditors and paid none of their debts, took from the mortgagee an assignment of the mortgage of the plaintiffs' goods, replevied them from the attaching officer, and refused to restore them to the plaintiffs; and that he was not prevented from performing his agreement by reason of the refusal of any creditor to accept the percentage. *Held*, that there was evidence sufficient to justify a finding that the defendant made an oral contract with the plaintiffs; that the terms thereof might be found outside the written plan of settlement; that it was not rescinded by the tripartite indenture; that the fact that the defendant in his replevin suit was adjudged to return the goods to the attaching officer was not a defence to this action and could not be considered in reduction of damages; and that (FIELD, C. J., HOLMES, & LATHROP, JJ., dissenting) the plaintiffs were entitled to recover the loss sustained by the failure of the defendant to extinguish their debt of $2,400 at a cost to them of $1,000, but not for his dealings with their goods, possession of which he obtained outside the contract.

CONTRACT, for breach of an agreement to extinguish the plaintiffs' debts and to relieve their goods from attachment, and tort for the conversion of certain articles belonging to the plaintiffs' stock in trade. Writ dated June 19, 1894.

The declaration annexed to the defendant's bill of exceptions was substituted for the original declaration, and alleged that prior to November, 1892, the plaintiffs, Solomon Banewur and Aaron Waterman, were copartners in the clothing business, having a stock in trade of the value of $4,000; that they were then indebted to the amount of about $2,200, and that they were unable to meet said obligations; that on or about November 17, 1892, one of said creditors caused an attachment of the plaintiffs' goods and fixtures to be made; that the plaintiffs, being unable to procure funds necessary to settle with their creditors, for the purpose of dissolving said attachment and paying all their creditors "entered into a certain agreement with the defendant, whereby the defendant agreed with the plaintiffs that, if the plaintiffs would convey to him, the defendant, all their right, title, and interest in and to said stock of goods and fixtures, he, the defendant, would thereupon immediately raise a sum of money, not exceeding eight hundred dollars ($800), to pay the said attaching creditor and discharge said attachment, and would thereafter assume to pay and would pay immediately as soon as might be to the remaining creditors the respective debts of the

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plaintiffs to each of said creditors, and after deducting the sum of two hundred dollars ($200) for his own services and disbursements, that he, the defendant, would then pay to the plaintiffs in equal parts, share and share alike, the balance of the proceeds of said goods; that the plaintiffs thereupon did convey unto the defendant all their right, title, and interest in and to said stock of goods and fixtures, which stock of goods and fixtures he had received; but the defendant has utterly failed to keep his part of said agreement, to wit, in that he, the defendant, has failed to pay any of the creditors of the plaintiffs, and has failed to account to or pay over to the plaintiffs any sum or sums of money due to them."

This declaration was subsequently amended by the addition of a second and third count. The second count was as follows:

"Prior to the 17th day of November, 1892, the plaintiffs had been copartners carrying on the business of clothing and dry goods dealers under the firm name of the Columbia Supply Company at Canton, Massachusetts. On said 17th day of November their stock of goods and fixtures were attached upon a writ against them in favor of Charles Green and Company, who were creditors of the plaintiffs to the amount of about six hundred dollars ($600), on which writ a deputy sheriff took and held all of said plaintiffs' goods and fixtures. The plaintiffs were without ready funds to liquidate the claim upon which said attachment was made, and were unable to meet other obligations which had matured and were maturing. Thereupon, by advice of the defendant, the plaintiffs procured from all their creditors an oral agreement to accept 33⅓ per centum of their respective claims against the plaintiffs in full settlement and discharge thereof; that the sum of money required to effect said settlement with creditors was about eight hundred dollars ($800); in order to raise said $800 immediately for the purpose of settlement with creditors the plaintiffs entered into a certain agreement with the defendant whereby the defendant agreed with the plaintiffs that he would advance to them, the plaintiffs, or on their account, the sum of $800 for the purpose of settlement with all the creditors, thereby securing the dissolution of the attachment already on said goods, and the full and complete discharge of the plaintiffs from their said debts; that the defendant should then receive

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said goods discharged from attachment as aforesaid, and hold the same in pledge to secure the repayment to him by the plaintiffs of said sum of $800, and an additional sum of $200, and that he, the defendant, would not proceed to sell the same without the consent of the plaintiffs, and would give the plaintiffs reasonable opportunity to redeem the same; that after payment to him by the plaintiffs of said $1,000 he would return to the plaintiffs said goods and fixtures; the plaintiffs agreed that the defendant should advance the sums aforesaid for the purposes aforesaid, and that the defendant thereafter should hold said goods in pledge as security for the repayment to him of said aggregate sum of $1,000; but the defendant has utterly failed to keep his part of said agreement, to wit, he has utterly failed to advance said sum of $800 or to pay any of the creditors of the plaintiffs the stipulated dividend of 33⅓ per cent, or any part thereof, and has failed to release said attachment of Green and Company by the payment of the percentage of the debt as agreed, and has failed to keep in his possession or to turn over to the plaintiffs said stock of goods and fixtures, or any part thereof; but has converted the same to his own use. Whereby the plaintiffs have been greatly damaged to the extent of the value of their said goods and fixtures, and have otherwise been greatly damaged."

The third count was for the conversion of the plaintiffs' stock in trade. Answer, a general denial.

The case was referred to an auditor, who found that on November 4, 1892, the plaintiffs made a mortgage of all their goods and chattels to one Woronoff for $2,000, without consideration, for the purpose of deterring their creditors from attaching them; that on November 17, 1892, their goods were attached; that thereafter the defendant agreed to pay to the plaintiffs' creditors, and the creditors agreed to accept, the sum of 33⅓ cents on a dollar on their debts, in satisfaction of their respective claims; that the defendant further agreed with the plaintiffs to hold their goods as security for the money he should advance and pay to their creditors, and for the incidental expenses thereof, until he should be reimbursed by the plaintiffs, whereupon the goods should be returned to them; that, at the request of the defendant, the plaintiffs caused their mortgage

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to Woronoff to be assigned to the defendant; that on April 15, 1893, the defendant, not having paid or tendered to the plaintiffs' creditors the percentage they had agreed to accept, and while the plaintiffs' goods were under attachment, brought a writ of replevin against the attaching officer, and removed them to his store in Boston, and, although prior to the commencement of this action judgment had been rendered in favor of the defendant in the replevin suit, the defendant refused to deliver the goods to the plaintiffs or to pay to their creditors the percentage as agreed; and that the defendant owed the plaintiffs the sum of $3,117.26 and interest.

Trial in the Superior Court, before *Dewey*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiffs offered evidence tending to show that, on or about the 4th day of November, 1892, they had contracted an indebtedness amounting to about $2,400, and that among their creditors they owed the defendant for goods purchased of him; that they gave a mortgage of $2,000 upon their stock of goods, without consideration, to one Woronoff; that on November 17, 1892, their goods were attached by Charles Green and Company, and subsequently by various other creditors, whereupon the plaintiffs obtained from the majority of such creditors an agreement to accept 33⅓ cents on the dollar of their respective claims; that, a disagreement arising between the plaintiffs, the matters in controversy were referred to five friends, of whom the defendant was one, who decided in writing that "all the creditors should be settled, and after subtracting the amount to be paid out, the surplus should be divided into two equal parts between Banewur and Waterman. Mr. Levenson undertakes to furnish $800. The goods of Banewur and Waterman, Mr. Levenson should take. But if Banewur should want to take the aforesaid goods, he may have it by paying to Levenson 75 per cent of its value. Waterman was to take the goods by paying full value. Levenson is to get $100 for his services in settling the estate, $100 for his probable expenses. As soon as Levenson receives the goods from Banewur and Waterman he must divide it into two equal parts, and Banewur may redeem his half and Waterman his half. Waterman is to pay full value in redeeming goods. The expenses to be paid by Banewur and Waterman equally. Leven-

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son must get amount due him in full"; — that this writing was assented to by the plaintiffs, and signed both by them and by the defendant, and thereupon the defendant stated orally that he would furnish the necessary $800 for settlement with the creditors; that subsequently, no settlement having been made with the creditors under the oral agreement the defendant gave to Charles Green, the first attaching creditor, his covenant to pay each of the plaintiffs' creditors the percentage of his claim and his legal expenses, and all but three of the plaintiffs' creditors gave their covenant to the defendant to accept such percentage in settlement of their claims; that the defendant made no settlement with the creditors under the composition agreement, but on Feburary 20, 1893, he took from Woronoff an assignment of the plaintiffs' mortgage.

The defendant testified that he bought the Woronoff mortgage and took an assignment of it to himself, and that he was informed by the plaintiffs and the mortgagee that it was a good mortgage; but the plaintiffs testified that the defendant was informed that the mortgage was without consideration, was invalid, and was to be discharged. Evidence was also introduced tending to show that on February 24, 1893, the plaintiffs and the defendant signed an indenture under seal of three parts, in which the plaintiffs were the party of the first part, the defendant was the party of the second part, and the creditors were the party of the third part, purporting to convey all the plaintiffs' property to the defendant in trust to reduce it to money, pay the preferred claims, distribute the rest ratably among the creditors, and release the plaintiffs from their debts; but no creditor signed this indenture; that on April 15, 1893, the defendant replevied the plaintiffs' goods from the attaching officer, and although in October, 1894, he was adjudged to return the goods, he refused so to do, and at the commencement of this action an action was pending against him on his replevin bond, to recover the value of the goods. Evidence was also introduced in support of the count for conversion, but the judge ruled that the plaintiffs could not recover thereon.

At the close of the evidence the defendant requested the judge to rule: 1. that upon all the evidence the plaintiffs cannot recover; 2. that the plaintiffs cannot set up or in any way

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avail themselves of the invalidity of the mortgage, although it might be avoided by their creditors; 3. that, the mortgage being valid and undischarged, the plaintiffs cannot maintain an action for the conversion of the goods covered by it; 4. that the plaintiffs cannot maintain this action by reason of the alleged failure of the defendant to execute the trust by settling with their creditors, but that their remedy, if any, is in equity, to compel the execution of the trust; 5. that the plaintiffs have shown no title to the goods, and cannot maintain an action for their conversion; 6. that if the jury find the defendant has become liable to the attaching officer by reason of the judgment against him in the action of replevin, the amount of such liability is to be allowed in reduction of damages in this action; 7. that it appearing that the trust is not settled, and that the plaintiffs' action is not brought for the purpose of repudiating it, the action cannot be maintained; 8. that if the plaintiffs' contention is true, that the defendant agreed to settle with their creditors, and he received the property for such purpose, then the defendant is liable to each of said creditors, and the amount for which he is so liable should be allowed in reduction of damages; 9. that if the jury find that the assignment of the plaintiffs' property was made to the defendant for the benefit of their creditors, oral evidence is inadmissible to vary its terms, and the rights of the parties must be determined by the assignment itself.

The judge declined to rule in terms as requested, and instructed the jury, in substance, that if, as the plaintiffs testified, when they gave a mortgage and note for $2,000 to Woronoff it was without consideration, because they owed him nothing and he paid nothing, and that it was made to prevent creditors from attaching their property, then, as matter of law, the mortgagee could not enforce the mortgage; that the plaintiffs testified that the defendant made a contract with them which is the basis of this action, by which he agreed to furnish $800 to be used in the settlement of their debts, amounting, as it is estimated, to $2,400; that it was a part of the contract that the defendant should receive $100 for his services and $100 more for his expenses, and that when he had furnished the money, settled the debts, and released the attachments, he was to hold the goods as security for his reimbursement of $1,000; that in this transaction

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the defendant assumed to stand in the attitude of a friend, and in this agreement or arrangement which they say they made, it is not claimed that Levenson took upon himself the responsibility of prevailing upon the creditors to settle for 33⅓ per cent. The arrangement with him went along upon the assumption that the creditors were willing; the plaintiffs claimed that the creditors had all been seen, and had expressed their willingness, and that most of them, if not all, had signed a paper to that effect, which has been put in evidence; and it is not claimed that Levenson undertook that the creditors should be willing to take 33⅓ cents. He left that for the plaintiffs, but he undertook to pay them 33⅓ per cent upon the assumption that they, the creditors, were and would be willing to take it. And so the plaintiffs, if they have a case against Levenson, have upon them the duty of satisfying the jury that, as matter of fact, the creditors were willing to take the 33⅓ per cent, and that no obstacle, serious obstacle, existed on that score, and to the settlement being made in the manner proposed. The plaintiffs say that was the condition of things: "We found our creditors willing to assent, we had had the advice of our friends that that was a proper settlement to make; Levenson agreed with us to furnish the money, $800, to settle with the creditors, and thereupon take our property into his hands and hold it as security for the $800 which he advanced, for the $100 which he was to receive for his compensation, and for the $100 which was reckoned as probable or as to be incurred in the way of costs." They must satisfy the jury, by the preponderance of the evidence, that such a state of things existed. The judge then further instructed the jury, that, if the defendant's failure or omission within a reasonable time to carry out his contract was caused by the refusal of the creditors to accept the percentage, that would constitute a defence; that the defendant relied upon the assignment of the mortgage, and contended that the plaintiffs could not maintain the action for not returning the property because he held an assignment of their mortgage; that the plaintiffs contended that the mortgage was originally without consideration, which the defendant knew when he took it; that if the facts were as stated by the plaintiffs, the mortgage was invalid and could not be relied upon by the defendant, but if it was valid he could

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rely upon it as a ground for refusing to hand back the property to the plaintiffs; that the assignment for the benefit of creditors, which was intended to be a tripartite instrument, which was signed only by the plaintiffs and the defendant, but was not signed or assented to by any of the creditors, could not be relied upon in defence as superseding his oral agreement; and that the replevin suit brought by the defendant did not constitute any defence to this action. The judge then said, in substance: "Now if under these simple instructions you find the plaintiffs entitled to recover on the count in contract, what are the damages? Well, the plaintiffs say that they were in debt $2,400, that Levenson was to pay one third of it, by which that would have been settled, and that they were to pay him in addition to their debts $200; so that this settlement, if it had been carried out by Levenson, would have cost them ultimately $1,000, and by an outlay of $1,000 they would have wiped out $2,400 of debts, so that there they lost $1,400. And they say that they would have had back their property besides, and they have lost whatever those goods were worth. I do not see but that is a fair statement of the rule of damages, provided the plaintiffs are entitled to recover, with an exception or two to which I am going to allude. Of course you have got to determine the value of the goods upon the evidence. Levenson says, 'Even if I am liable to the plaintiffs for these goods, I am not liable for their full value, for Waterman has had $450 worth of the goods, and I ought not to be held liable to him and his partner over again for goods which they have had and carried off.' Well, that is true if they took the goods in a certain way, as for instance if they went to the defendant's premises without his knowledge and took off $450 worth of these goods, or if, recognizing that Waterman had some interest in the goods under the written plan of settlement, he allowed him to have that amount of the goods as one of the original part owners, and not upon terms of payment to him, then he would not, if liable at all, be liable for the value of those goods; but if, on the contrary, he merely made a sale of them to Waterman, he could not rely upon that in reduction of damages, because that was an independent matter which he must settle with Waterman alone. If Levenson took the goods and did not return them when he ought to, he would be

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liable for nominal damages, and if the goods went to either of the plaintiffs by their action, and not by contract of sale, he would be liable merely for nominal damages."

The judge submitted to the jury the following questions: "1. Did the defendant enter into a contract with the plaintiffs whereby he agreed to furnish money to the extent of $800 for settlement with the plaintiffs' creditors, and a further sum of $100 for expenses of said settlement? 2. Was the defendant unable to carry out such settlement by reason of the refusal of the creditors of the plaintiffs, or any of them, to accept a dividend of 33⅓ per cent?" The first question was answered in the affirmative, and the second in the negative.

The jury on October 19, 1896, returned the following verdict: "The jury find for the plaintiffs, and assess damages in the sum of $1,500, and interest to date, $315.10, making $1,815.10"; and the defendant alleged exceptions.

The case was argued at the bar in March, 1897, and afterwards was submitted on briefs to all the justices.

J. E. Young & P. H. Cooney, for the defendant.

S. L. Whipple, (*J. Bon* with him,) for the plaintiffs.

BARKER, J. The exceptions relating to the count in tort are now immaterial. The verdict is upon a count in contract not set out in the bill of exceptions, but a copy of which is with the record transmitted to the Chief Justice. The defendant contends that the case should not have been left to the jury, and that the instructions given as to the different defences and as to the measure of damages were wrong.

The case seems to have been submitted to the jury by the presiding justice, with the assent of both parties, upon issues not strictly defined by the pleadings, and we consider the questions raised as if the pleadings, which had been repeatedly amended, presented the issues which the presiding justice in his charge directed the jury to try and to decide, the arguments in this court having been upon the issue so raised. In the course of the charge the real issue upon which the jury were to pass was thus stated by the presiding justice: "The plaintiffs say that was the condition of things: 'We found our creditors willing to assent, we had had the advice of our friends that that was a proper settlement to make; Mr. Levenson agreed with us to

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furnish the money, $800, to settle with the creditors, and thereupon take our property into his hands and hold it as security for the $800 which he advanced, for the $100 which he was to receive for his compensation, and for the $100 which was reckoned as probable or as to be incurred in the way of costs.' Now, they must satisfy you, of course, by the preponderance of the evidence, that such a state of things existed."

The plaintiffs contend that their case is this. They were dealers having a stock of goods and owing $2,400 which they could not pay. Creditors had sued, and the stock of goods was in possession of an officer under attachments. All the creditors were willing to take off the attachments and to release the plaintiffs from the debts upon receiving 33⅓ per cent of their claims. Thereupon the defendant orally agreed with the plaintiffs to furnish $800 and a further sum of $100 for expenses, and with this sum to extinguish the plaintiffs' debts; and for his services he was to have another $100. Upon the release of the attachments he was to have possession of the stock of goods until he should be reimbursed and paid the sum of $1,000, made up as stated.

The defendant has furnished no money, and has paid none of the debts, but has got possession of the stock of goods, and has refused to restore them to the plaintiffs. The defendant was not prevented from performing his agreement by the refusal of any creditor to accept the percentage. The verdict founded upon this contract and its breach was rendered under instructions which allowed the jury to give damages because the plaintiffs' debts of $2,400 were not extinguished at a cost to them of $1,000, and for loss upon the stock of goods which the defendant got possession of by other means than through the performance of his contract.

1. The first contention now made by the defendant, in support of his exceptions, is that there was no evidence of a contract between the plaintiffs and the defendant, and that the only contract which he made was with the creditors.

The evidence tended to show that the first attachment was made on November 17, 1892, and that other creditors made successive attachments, whereupon the plaintiffs visited their creditors and secured from most of them an agreement to

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accept the 33⅓ per cent. After this there was a disagreement between the plaintiffs, and friends were called in, who made a written statement communicated to and signed by each of the plaintiffs. This statement contained several particulars as to what the defendant was to do, and he was one of the persons who signed it, and when it was communicated to and assented to by the plaintiffs he stated orally that he would furnish the $800 for settlement with the creditors; and not long after he gave to the first attaching creditor his covenant to pay each of the plaintiffs' creditors the percentage of their respective claims and the legal expenses. This evidence, with the auditor's report, was enough to justify the finding that the defendant did make an oral contract with the plaintiffs. It was natural for him to agree with the creditors to pay them their percentages and expenses after he had made that agreement with the plaintiffs.

2. The defendant next contends that, if there was a contract between himself and the plaintiffs, its terms must be found in the statement of the friends who were called in as before stated, and that the delivery of the stock of goods to him was a condition precedent which was to be performed by the plaintiffs, and which precludes their recovery. But the terms of the contract might be found outside of the writing.

3. The defendant also contends that the plaintiffs cannot recover upon the oral contract, because it has been abandoned and rescinded by the parties. Such a defence must be established by proof, and the burden of proving it is upon the defendant. The evidence tended to show that, some weeks after the defendant had covenanted to pay the creditors their percentages and legal expenses, the plaintiffs and the defendant signed an indenture under seal, of three parts, in which the plaintiffs were the party of the first part, the defendant was the party of the second part, and the creditors were the party of the third part, but no creditor ever assented to it. This indenture purported to convey all the plaintiffs' property to the defendant, in trust to reduce it to money, and to pay preferred claims and distribute the rest ratably among the creditors, and to release the plaintiffs from their debts.

The presiding justice ruled that this indenture could not be relied upon as a defence, because, never having become complete

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by the signatures of the creditors, it remained inchoate and of no effect. We think this ruling right. As presented at the trial, the question was not whether the jury might infer, from the execution of the indenture by the plaintiffs and the defendant, an actual previous abandonment and rescission of the previous oral agreement, but whether the indenture itself in the condition in which it was put in evidence, unexecuted by the creditors, worked such a rescission, and it did not.

4. The defendant further contends that a suit in which he has replevied the goods from the attaching officer, and has been adjudged to return them, is a defence. We cannot see that these transactions bar the plaintiffs' action for breach of the defendant's contract. He, and not the plaintiffs, was to procure the release of the goods; the plaintiffs were not to deliver them to him. That he has chosen another course, which is in violation of his contract, and has placed him under obligations to third persons, is not a defence to the plaintiffs' action for his breach of his contract with them.

Nor do we see how the fact that the defendant has made himself liable to the attaching officer in damages for the failure to return the goods to the officer upon the judgment for a return could be considered in reduction of damages in the present suit. If a possible problematical future result of the wrong which the defendant did to the attaching officer in replevying the property, when the latter was entitled to its possession, may be the payment of some debt of the plaintiffs, the defendant cannot offset that contingent future benefit against the damages caused to them by his own breach of contract. It is wholly problematical whether such a result will ever follow.

5. The final contention of the defendant is that the plaintiffs cannot recover the whole amount that they expected to gain by the contract, unless they can show that, after the defendant neglected to furnish the money, they used diligence in trying to get it elsewhere. If the contract had been merely to furnish them with $800 as a loan, damages for the loss which the plaintiffs suffered in not having their debts cancelled and discharged would have been too remote. But the contract which the plaintiffs asked the jury to find was not a contract to lend them money, but that the defendant would himself apply his own money in a

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certain way, and so release their property from attachment and themselves from debts of three times the amount of the money to be used. The breach of the contract was not in a failure to lend to the plaintiffs $800, but in the failure to extinguish for them debts to the amount of $2,400, and to relieve their goods from attachment. Having made that bargain with him, they were not required, in order to recover damages for its breach, to prove that they tried to procure some one else to stand in his shoes. No such question seems to have been raised at the trial, and the question what would be the measure of damages for breach of a contract to lend money is not open.

But we are of opinion that there was an error in the instructions upon the question of damages. It appears, from the bill of exceptions and the finding of the jury, that no part of this contract between the plaintiffs and the defendant was ever performed. The plaintiffs' case was finally allowed to stand only upon the count in contract, and the jury were not permitted to consider the count in tort for a conversion of the goods. The defendant would be accountable for goods under his contract only if he received them under the contract. The instructions to the jury, as well as the facts set out in the bill of exceptions, tend to show that he never received or held them under the contract, but that he obtained them under a title adverse to the plaintiffs, and held them as an assignee of the mortgage, and replevied them, claiming under that title. If the contract was never executed by either party in respect to the possession or ownership of the goods, and if the defendant never received or held them under the contract, the plaintiffs cannot recover any part of their value under this count for a breach of the contract, but must seek otherwise their remedy for the defendant's interference with their property.

If the defendant had held the goods under the contract, the plaintiffs might have recovered not only the difference between the amount which it would have cost them to pay their debts if he had performed his promise and the amount of the debts for which they were left liable, but also the excess of value of the goods, if any, above the sum which under the contract they would have been obliged to pay the defendant to redeem them. But upon the case as it appears, the plaintiffs' damages should have

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been limited to the difference between the whole amount of debts which the defendant was to discharge and the sum which the defendant was to pay the creditors, and which the plaintiffs were to repay him to redeem the goods. This difference was stated by the judge in his charge to be $1,400, and does not seem to have been in dispute. We can safely assume that this sum, with interest from the time of the transaction in February, 1893, was awarded by the jury as a part of their verdict for damages. The excess above this they must have allowed on account of the goods.

The decision of the majority of the court is, that, if the plaintiffs elect to remit in the Superior Court so much of the verdict as is in excess of $1,400 and interest from February 3, 1893, a new trial will not be necessary. Otherwise the entry must be

Exceptions sustained.

FIELD, C. J. I am unable to assent to the opinion of the majority of the court. If this case had been tried, as the exceptions state, upon the amended or substituted count in contract which is annexed to the exceptions, it is plain that the evidence would not support the count. It is alleged in that count that the plaintiffs "entered into a certain agreement with the defendant, whereby the defendant agreed with the plaintiffs that, if the plaintiffs would convey to him, the defendant, all their right, title, and interest in and to said stock of goods and fixtures, he, the defendant, would thereupon immediately raise a sum of money, not exceeding eight hundred dollars ($800), to pay the said attaching creditor and discharge said attachment, and would thereafter assume to pay and would pay immediately as soon as might be to the remaining creditors the respective debts of the plaintiffs to each of said creditors, and after deducting the sum of two hundred dollars ($200) for his own services and disbursements, that he, the defendant, would then pay to the plaintiffs in equal parts, share and share alike, the balance of the proceeds of said goods; that the plaintiffs thereupon did convey unto the defendant all their right, title, and interest in and to said stock of goods and fixtures, which stock of goods and fixtures he had received." There was no evidence that the plaintiffs conveyed to the defendant all their right, title, and

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interest in their stock of goods. It is true that the stock of goods was under attachments, and that the plaintiffs had given a mortgage upon the stock for $2,000 to one Woronoff, which they say was without consideration, and was given by them in order to prevent attachments, but they still could have conveyed to the defendant all their right, title, and interest in the stock, subject to the attachments and to the mortgage, if that had any validity. As the plaintiffs did not do this, they proved no cause of action under this count.

It was said by the plaintiffs' counsel at the argument, and, as I understand, it was conceded, that the case actually was tried upon an amendment to this count, and such an amendment appears in the copy of the pleadings. That amendment is as follows:

"Second Count. Prior to the 17th day of November, 1892, the plaintiffs had been copartners carrying on the business of clothing and dry goods dealers under the firm name of the Columbia Supply Company at Canton, Massachusetts. On said 17th day of November their stock of goods and fixtures were attached upon a writ against them in favor of Charles Green and Company, who were creditors of the plaintiffs to the amount of about six hundred dollars ($600), on which writ a deputy sheriff took and held all of said plaintiffs' goods and fixtures. The plaintiffs were without ready funds to liquidate the claim upon which said attachment was made, and were unable to meet other obligations which had matured and were maturing. Thereupon, by advice of the defendant, the plaintiffs procured from all their creditors an oral agreement to accept 33⅓ per centum of their respective claims against the plaintiffs in full settlement and discharge thereof; that the sum of money required to effect said settlement with creditors was about eight hundred dollars ($800); in order to raise said $800 immediately for the purpose of settlement with creditors the plaintiffs entered into a certain agreement with the defendant whereby the defendant agreed with the plaintiffs that he would advance to them, the plaintiffs, or on their account, the sum of $800 for the purpose of settlement with all the creditors, thereby securing the dissolution of the attachment already on said goods, and the full and complete discharge of the plaintiffs from their said debts;

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that the defendant should then receive said goods discharged from attachment as aforesaid, and hold the same in pledge to secure the repayment to him by the plaintiffs of said sum of $800, and an additional sum of $200, and that he, the defendant, would not proceed to sell the same without the consent of the plaintiffs, and would give the plaintiffs reasonable opportunity to redeem the same; that after payment to him by the plaintiffs of said $1,000 he would return to the plaintiffs said goods and fixtures; the plaintiffs agreed that the defendant should advance the sums aforesaid for the purposes aforesaid, and that the defendant thereafter should hold said goods in pledge as security for the repayment to him of said aggregate sum of $1,000; but the defendant has utterly failed to keep his part of said agreement, to wit," etc.

The gist of this amended count, I think, is that the defendant agreed with the plaintiffs to advance to them the sum of $800 for the purpose of a settlement with their creditors, which sum the creditors had agreed with the plaintiffs to receive in discharge of the indebtedness, that the plaintiffs agreed that when the debts were discharged, and the attachments dissolved, the defendant should receive from them their stock of goods, as a pledge to secure the repayment of this $800 and the payment of the further sum of $200, and that although the plaintiffs were ready and willing to perform their part of the agreement the defendant failed to perform his part. This I think also is the substance of the agreement which the presiding justice understood that the plaintiffs contended that they had made, and had introduced evidence of at the trial. If the defendant undertook to pay the money to be advanced directly to the creditors, this was only as a means of insuring the proper application of the money, and the transaction intended was still of the nature of a loan to the plaintiffs. In his charge the presiding justice states the agreement as follows:

"And in this agreement or arrangement which they say they made, it is not claimed that Mr. Levenson took upon himself the responsibility of procuring that the creditors should be willing to settle for 33⅓ per cent. The arrangement with him went along upon the assumption that the creditors were willing; the plaintiffs claimed that the creditors had all been seen, and had

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expressed their willingness, and that most of them, if not all, had signed a paper to that effect, which has been put in evidence; and it is not claimed that Mr. Levenson undertook that the creditors should be willing to take 33⅓ cents. He left that for the plaintiffs, but he undertook to pay them 33⅓ per cent upon the assumption that they, the creditors, were and would be willing to take it. And so the plaintiffs, if they have a case against Mr. Levenson, have upon them the duty of satisfying you that, as a matter of fact, the creditors were willing to take the 33⅓ per cent, and that no obstacle, serious obstacle, existed on that score, and to the settlement being made in the manner proposed. The plaintiffs say that was the condition of things: 'We found our creditors willing to assent, we had had the advice of our friends that that was a proper settlement to make. Mr. Levenson agreed with us to furnish the money, $800, to settle with the creditors, and thereupon take our property into his hands and hold it as security for the $800 which he advanced, for the $100 which he was to receive for his compensation, and for the $100 which was reckoned as probable or as to be incurred in the way of costs.'"

The trial apparently took a wide range, as evidence was introduced upon a count in tort for a conversion of the goods, but at the close of the evidence the court ruled that the plaintiffs could not recover upon the count for a conversion, and the case went to the jury upon the evidence introduced applicable to this amended count in contract.

The defendant testified that he bought the Woronoff mortgage for $50, and took an assignment of it to himself, and that he was informed by the plaintiffs and the mortgagee that it was a good mortgage. The plaintiffs testified that the defendant was informed that the mortgage was without consideration, was invalid, and was to be discharged. After the defendant procured the assignment of this mortgage to himself, he replevied the goods of the plaintiffs from the attaching officer, and on the trial of that action a verdict was rendered in favor of the defendant in replevin, and the plaintiff in replevin was ordered to return the goods, and, failing to do so, the officer brought suit against the plaintiff in replevin and the sureties on his bond, which action was pending when the case at bar was tried.

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The ruling of the court at the trial of the present case upon the effect of this mortgage, and the assignment of it and of the action of replevin, was, I think, sufficiently favorable to the defendant. The ruling of the court upon the effect of the written assignment for the benefit of the creditors of the plaintiffs was I think correct. That written assignment, not having been executed by the creditors of the plaintiffs, never took effect.

The defendant never has had in his possession the plaintiffs' goods as a pledge under his agreement with them to advance the sum of $800. He got possession by the writ of replevin, but that was not a possession under the agreement. That possession by the defendant might perhaps have excused the plaintiffs from delivering possession to the defendant if he had lent or advanced the money to them as he agreed, but as it was a possession independent of the agreement, it has nothing to do with the measure of damages for the breach of the agreement. If the purchase of the mortgage and the replevying of the goods as assignee of the mortgage were a wrong to the plaintiffs, upon which I express no opinion, that is a cause of action distinct from the failure to lend or advance the money as agreed.

There was, I think, some evidence for the jury that the defendant made the agreement declared on in the count in contract as finally amended, and that he had broken that agreement, to the damage of the plaintiffs. What, then, is the measure of damages for the failure to advance the sum of $800, under the agreement declared on? The jury, under the instructions of the court, rendered their verdict on October 19, 1896, as follows: "The jury find for the plaintiffs, and assess damages in the sum of $1,500, and interest to date, $315.10, making $1,815.10." If the defendant had owed the plaintiffs $800, and had promised to pay it on a day certain, and had failed to do so, no matter how much the plaintiffs had suffered from this failure, they could recover only $800 and interest. *Loudon* v. *Taxing District*, 104 U. S. 771. *New Orleans Ins. Co.* v. *Piaggio*, 16 Wall. 378. For a breach of promise to lend or advance money when the plaintiffs have parted with nothing as the consideration for the promise, but only have made certain promises in return, the damages often are merely nominal. The reasonable cost of procuring another similar loan, or, if another loan has not been obtained, the value

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of the contract to the plaintiffs, or what it would have cost them to procure a similar loan on the same terms, usually has been allowed as damages. This I think is the correct rule. *Prehn* v. *Royal Bank of Liverpool*, L. R. 5 Ex. 92. *Western Wagon & Property Co.* v. *West*, [1892] 1 Ch. 271, 277. *South African Territories* v. *Wallington*, [1897] 1 Q. B. 692. See *Greene* v. *Goddard*, 9 Met. 212, 232, 233; *Dodd* v. *Jones*, 137 Mass. 322; Sedgwick, Damages, (8th ed.) 622. Under this rule I think it is obvious that the damages never can be more than the amount agreed to be lent, with interest, and usually would be much less, often would be little or nothing. If A. has no property and owes debts to the amount of $100,000, which he can settle for cash at one cent on the dollar, and B. agrees to lend him $1,000 for this purpose, which sum A. agrees to pay back with interest, it seems to me unwarrantable to hold, as matter of law, that if B. fail to lend the money A. can recover of B. $99,000 for the breach. Even if it were held that the value of the indebtedness which A. could discharge with the $1,000, less what he had agreed to pay B. for the loan, is the measure of damages, it still seems to me unwarrantable to hold, as matter of law, that the value of the indebtedness is $100,000. In such a case, the fact that the indebtedness can be discharged by the payment of $1,000 tends strongly to show that the indebtedness is not worth more than one cent on the dollar.

The majority of the court having found that, under the charge of the presiding justice, the jury were permitted to find something for the value of goods, in addition to the difference between the amount of the debts of the plaintiffs and the $1,000 which the plaintiffs agreed to pay in discharge of the loan, have permitted the plaintiffs to remit from the principal sum of the verdict all in excess of the sum of $1,400, upon which sum, with interest from February 3, 1893, the plaintiffs, if they elect to remit, are to have judgment. It is said, in the opinion, of the difference between the amount of the plaintiffs' debts and $1,000, that "this difference was stated by the judge in his charge to be $1,400, and does not seem to have been in dispute." This difference has not been found by the jury in the answers to the questions put by the court. The presiding justice charged the jury as follows: "Now if under these simple instructions you

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find the plaintiffs entitled to recover on the count in contract, what are the damages? Well, the plaintiffs say that they were in debt $2,400, that Mr. Levenson was to pay one third of it, by which that would have been settled, and that they were to pay him in addition to their debts $200; so that this settlement, if it had been carried out by Mr. Levenson, would have cost them ultimately $1,000, and by an outlay of $1,000 they would have wiped out $2,400 of debts, so that there they lost $1,400. And they say that they would have had back their property besides, and they have lost whatever those goods were worth. I do not see but that is a fair statement of the rule of damages, provided the plaintiffs are entitled to recover, with an exception or two, to which I am going to allude." The exception or two to which he afterwards alludes relate to the damages for the value of goods. It seems that there was evidence that Banewur, one of the plaintiffs, and one Waterman, had taken possession of some of the goods, for the value of which, under the instructions of the presiding justice, the defendant might not be liable.

Under this rule, the damages to be given for the loss of goods were not damages for the conversion of goods, but damages for a loss of goods occasioned by the breach of the contract. But the goods were not lost to the plaintiffs by reason of the breach of the contract; if they had not been replevied, they would ultimately have been applied in discharge of the indebtedness, and their value, if recovered, will still be so applied; and if this value is not recovered, that is the result of the action of replevin, and the action of replevin was not the natural and probable result of the breach of the contract, but was something independent of the contract.

The exact amount of the indebtedness of the plaintiffs is nowhere stated in the exceptions. It is stated in the exceptions "that on or about the 4th day of November, 1892, they (the plaintiffs) had contracted an indebtedness amounting to about $2,400, and that among their creditors they owed the defendant for goods purchased of him." The writ is dated June 19, 1894, and the verdict was rendered on October 19, 1896, and the indebtedness is referred to in the charge of the justice at the trial as $2,400, or about $2,400, or "amounting as it is estimated to $2,400." I doubt if there is any such exact determination of the

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amount of damages found by the jury on account of the difference between $1,000 and the amount of the indebtedness, and of the amount found by them for the value of goods lost by reason of the breach of the contract, as would justify the court in allowing the remittitur and then permitting the verdict to stand. My principal objection, however, is to the rule of damages given for the breach of the contract, which seems to me erroneous, even if all damages for the value of goods had been excluded. I think that the exceptions should be sustained.

Justices HOLMES and LATHROP concur in this dissent.

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FREDERICK T. JONES *vs.* ARENA PUBLISHING COMPANY.

Suffolk. December 14, 1897. — April 16, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Receiver — Distribution of Assets — Claims entitled to Priority of Payment.

Upon a bill in equity for the appointment of a receiver to take possession of the property of a corporation and distribute its funds among its creditors, the court, without intending to prescribe a fixed rule, adopted the date of the appointment of the receiver for adjusting the rights of the parties on the ground that it would be fairer than the date of the filing of the bill.

Upon a bill in equity, brought before the enactment of St. 1897, c. 400, for the appointment of a receiver to take possession of the property of a corporation and distribute its funds among its creditors, unpaid taxes on the personal property assessed prior to the receivership, and debts due to operatives, clerks, and servants for labor prior to the receivership, are entitled to priority. FIELD, C. J., ALLEN & MORTON, JJ., dissenting.

Upon a bill in equity for the appointment of a receiver to take possession of the property of a corporation and distribute its funds among its creditors, the business having gone on in good faith and without being in any way affected by the pendency of the bill until the appointment of the receiver, notes given in the prosecution of the business up to that time should be allowed whenever they mature, with the addition or rebate of interest as in insolvency proceedings.

Upon a bill in equity for the appointment of a receiver to take possession of the property of a corporation and distribute its funds among its creditors, there is no reason why a claim should have priority, the work for which priority of payment is claimed having been done in pursuance of a contract with the corporation made before the filing of the bill, and not at the request of the receiver nor for the purpose of aiding the court either in keeping the business alive or administering the assets of the corporation.

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BILL IN EQUITY, filed November 16, 1896, praying that the defendant be enjoined from the transaction of business, and that a receiver be appointed to take possession of the property, collect debts, and distribute the funds ratably among the creditors who should prove their claims. Trial in the Superior Court, before *Sheldon*, J., who, at the request of the parties, reported the case for the determination of this court, in substance as follows.

The defendant published the monthly magazine called The Arena, 30,000 copies of which were printed each month, and also printed books, having accounts with many authors. In November, 1896, one Jones, an employee of the company, obtained a judgment against it for $690.97, and for $7.82 costs of suit, on which execution issued and was served; and the same being wholly unsatisfied, Jones filed a bill in equity for relief against the company, reciting that it was brought "in behalf of himself and all other unsatisfied creditors of the defendant corporation, who shall join herein and become a party plaintiff to this bill."

The bill further recited that the defendant owed about $58,000 upon notes, and about $7,800 on sundry current bills, mostly to citizens of Massachusetts; that it was "practically insolvent"; that the peculiar nature of the assets of the company justified a continuance of the monthly publication of the magazine, and the protection of its contracts with various authors, in order to maintain the good will of the business, whether for purposes of a reorganization of the company, or for a sale of its assets to satisfy the outstanding debts of the company; that divers suits were about to be instituted against the company, as a result of which the assets of the company would be of little or no value "if sought to be reached at law, and if the said corporation should cease to do business and its assets should be disposed of by proceedings in insolvency, or under execution at law; and that if a receiver should be appointed to take charge of the business and assets of the corporation, and continue, subject to the approval of this court, the publication of the magazine," and divers books, it would be more advantageous for all concerned.

No attachment of property was made by the plaintiff, either

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under the bill or under the proceedings in the court, when obtaining judgment against the defendant. An order of notice was issued on November 23, 1896, to show cause why a temporary injunction should not be granted, and why a receiver should not be appointed as prayed for in the bill, the order being made returnable on December 1, 1896, which order of notice was duly complied with. No answer was filed by the defendant, but it was represented by counsel at the hearing to show cause. An injunction was issued, and Mr. Alfred D. Chandler was appointed receiver, on December 1, 1896, and duly qualified, and took possession of the company's property on December 2, 1896.

Under orders of the court the receiver continued the publication of the magazine for the two months of January and February, 1897, and under orders of the court, on January 23, 1897, he sold the property at public auction for $13,400.

The decree for the proof of claims was made on December 24, 1896. extended on January 29, 1897, and expired, by extension, on March 1, 1897. About one hundred and sixty claims were filed, representing about $65,000.

On March 23, 1897, the receiver filed his petition in the Superior Court for instructions upon certain questions necessary for determination before a final distribution of the funds on deposit could be made.

1. What date shall be taken to fix the rights of the parties, the date of the filing of the bill, November 16, 1896, or the date of the appointment of the receiver, December 1, 1896?

The judge directed a decree that the date of the appointment of the receiver, December 1, 1896, was to be taken to fix the rights of the parties.

2. Shall unpaid taxes on the personal property of the defendant, assessed prior to the receivership, be entitled to priority?

The city of Boston duly filed its proof of claims with the receiver for these taxes, amounting to $64.50, on February 25, 1897, the said proof containing no claim for a priority in favor of the State, county, or city.

On January 23, 1897, all the property of the defendant was sold by public auction, and the receiver's bill of sale therefor was duly executed and delivered to the purchaser on February 3, 1897, who thereupon took possession of the property, no action

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by way of suit or distress for the collection of the taxes upon the personal estate of the company having been at any time taken by the city of Boston.

The judge directed a decree that unpaid taxes on the personal property of the defendant, assessed prior to the receivership, were to be entitled to priority.

3. Shall salaries, wages, or compensation, due to an employee of the Arena Publishing Company prior to the receivership, be entitled to priority, and if so to what amount and for how long a period preceding the receivership?

The judge directed a decree that unpaid wages due to operatives, clerks, and servants, to an amount not exceeding one hundred dollars for labor performed within one year of the appointment of the receiver, but no other wages to employees of the defendant were to be entitled to priority.

4. Shall a promissory note of the defendant, made between the date of the filing of the bill and the date of the appointment of the receiver, be proved and allowed?

5. Shall a promissory note of the defendant, which matured on the date of the filing of the bill, or which matured between the date of the filing of the bill and the date of the appointment of the receiver, or which matured at any time thereafter, be proved and allowed?

The greater part of the indebtedness of the company was in the form of promissory notes aggregating over $50,000. One or more notes were issued by the company in the interim between the filing of the bill in equity, on November 16, 1896, and the date of the appointment of the receiver, on December 1, 1896. Most of the notes issued by the company matured at or after the date of the filing of the bill, many of them being notes given in renewal of old notes.

Upon the fourth and fifth questions the judge directed a decree that promissory notes of the defendant, made between the date of the filing of the bill and the date of the appointment of the receiver, or which matured on the date of the filing of the bill, or at any time thereafter, if made before the appointment of the receiver, were to be proved and allowed like other claims, but with adjustment of interest to the date of the appointment of the receiver.

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6. Shall a claim of Skinner, Bartlett, and Company, for $1,063.29 for printing and binding 30,000 copies of the Arena magazine for December, 1896, be entitled to priority, the said claim not being presented in this specific form to the court until April 27, 1897, the time for filing claims having expired on March 1, 1897, but the said claim being included in the general claim of said Skinner, Bartlett, and Company for $7,801.68, duly filed prior to March 1, 1897, of which general claim $6,092.62 are in promissory notes of the defendant?

The magazines were delivered by Skinner, Bartlett, and Company in November, 1896, prior to the appointment of the receiver, in accordance with a written contract, partly to the defendant, and partly to the New England News Company in Boston, as a purchaser from the defendant. Many of the magazines so delivered to the defendant were sent to subscribers prior to the appointment of the receiver, and the remainder became a part of the assets in the hands of the receiver, which were sold by him under the order of the court. The New England News Company paid the receiver for that portion of the magazines which were sold and delivered to the said News Company prior to the receiver's appointment. If Skinner, Bartlett, and Company had not delivered the magazines, the continuous publication of the Arena magazine would have been prevented or materially delayed, and the value of the assets correspondingly affected.

The judge directed a decree that the claim of Skinner, Bartlett, and Company was not entitled to priority.

From the decrees entered in accordance with the above directions, Skinner, Bartlett, and Company appealed.

The case was argued at the bar in December, 1897, and afterwards was submitted on briefs to all the justices.

S. W. Creech, for Skinner, Bartlett, and Company.

W. S. Pinkham, for general creditors of the defendant.

A. D. Chandler, receiver, submitted the case on a brief.

BARKER, J. The first question is whether the rights of the parties should be adjusted as of the date of the filing of the bill, or as of the date of the appointment of the receiver. In similar bills, where the jurisdiction is given by statute, the usual course here has been to adopt the date of the filing of the bill, or of the issuing of the injunction. *Atlas Bank* v. *Nahant Bank*, 23

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Pick. 480. *Colt* v. *Brown*, 12 Gray, 233. *Burdon* v. *Massachusetts Safety Fund Association*, 147 Mass. 360. *Merrill* v. *Commonwealth Ins. Co.* 166 Mass. 238. *Williams* v. *United Reserve Fund Associates*, 166 Mass. 450. The date of the filing of the bill has also been adopted in some instances where the bill was filed under general equity powers. See *Fogg* v. *United Order of the Golden Lion*, 156 Mass. 431; *Garham* v. *Mutual Aid Society*, 161 Mass. 357.

But in *Merrill* v. *Commonwealth Ins. Co.*, *ubi supra*, it was said that the court had no occasion then to consider what the rule should be in cases where receivers are appointed under general equity powers, and we think that there is no settled rule which forbids the adoption of the date of the appointment of the receiver where the bill is entertained under general equity powers. The more usual rule elsewhere seems to be that in such cases the date of the appointment of the receiver should be adopted. High, Receivers, §§ 136 *et seq.* Beach, Receivers, (2d ed.) §§ 217 *et seq.* Smith, Receiverships, § 17. Gluck & Becker, Receivers, § 89. Thompson, Corp. § 6919. Without intending to prescribe a fixed rule, we think that in the present case the adoption of the date of the appointment of the receiver will be more fair to all parties than that of the filing of the bill, and that the decree in this respect should be affirmed. There was no injunction issued upon the filing of the bill, the corporation continued its business as usual, and those who dealt with it in the interim did so without being influenced, so far as appears, by the fact that the suit was pending, and in the interim no attachments or other liens were placed upon the property. In this particular case, the only effect of holding that the proceedings should relate back to the filing of the bill would be to raise the question whether bills contracted by the corporation during the interim, not upon faith in the proceedings, but upon the ordinary credit of the corporation, should be treated as if incurred by the receivers in execution of the powers afterwards given to them, or should go wholly unpaid.

The questions whether taxes and debts due to workmen for labor are entitled to priority may be considered together. The relief sought is merely the getting in and the distribution of what are known in equity as legal assets. "In the course of

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the administration of assets, courts of equity follow the same rules in regard to legal assets which are adopted by courts of law, and give the same priority to the different classes of creditors which is enjoyed at law, thus maintaining a practical exposition of the maxim, '*æquitas sequitur legem.*'" Story, Eq. Jur. § 553. *Morrice* v. *Bank of England*, Cas. temp. Talbot, 218, 220, 221. And it makes no difference whether the general rules and policy of the law to which equity conforms are stated in the common or the statute law. Pomeroy, Eq. Jur. § 425. It would be a plain injustice if a general creditor, by resorting to equity for the administration of his debtor's goods, merely for the reason that by the aid of equity the amount to be divided would be larger, could gain a further advantage by reducing to the level of common creditors workmen whose wages would have priority if the assets were left to be administered at law, or could thus place his own debts upon an equality with taxes which would have been paid in full had not equity intervened. The defendant corporation was subjected to our insolvency law by force of St. 1890, c. 321, and if equity had not come in to conserve and distribute its legal assets, the wages of its workmen and the taxes due from it would have priority in the distribution of its assets by the usual agencies of common law. Those agencies could not keep its business going at the time when the bill was filed. For this reason only, the creditors, merely to increase the amount of the fund, asked equity to interfere in behalf of all creditors alike. It would be unjust if that interference should be at the sole cost of the workmen and of the public, through depriving claims for labor and taxes of the priority of payment which they would have had if equity had not intervened. As a precedent in this Commonwealth, the question is not now of great importance, as the Legislature by St. 1897, c. 400, has declared that in the settlement of estates by receivers such claims shall have priority. In the present case that statute does not control, but without it, in administering merely legal assets because our aid has been asked for a merely incidental matter, we may say that wages and taxes shall not lose the priority they would have at law merely by the change in the tribunal which deals with the assets.

In *Commonwealth* v. *Phœnix Bank*, 11 Met. 129, the decision

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was upon other grounds, and this court has said, in holding that the same rule should be applied in ascertaining the balances due between a corporation whose affairs are being wound up in equity by receivers and its creditors and debtors as when its assets were to be dealt with in bankruptcy or insolvency, that equity will not permit the general rule to be affected by the question by whom or in what forum the proceedings are set in motion, and also that in ascertaining the amount due to any creditor the court will follow as far as practicable the rule established by statute in proceedings in insolvency or bankruptcy. *Commonwealth* v. *Shoe & Leather Dealers' Ins. Co.* 112 Mass. 131. *Commonwealth* v. *Hide & Leather Ins. Co.* 119 Mass. 155. Rather than to commit an injustice in the administration of the assets, the court might well decline to distribute the fund, and require the institution of proceedings in insolvency in order that the fund might be distributed by assignees. But we think the court has power to recognize priorities which would have obtained if the assets had been administered in common law tribunals, and that the Superior Court was right in so holding. The justice of the Superior Court gave directions upon these points which followed the insolvency statutes, and gave only such preferences as would have been given if the assets had been distributed in insolvency.

The directions upon the other questions were right. The business went on in good faith and without being in any way affected by the pendency of the bill until the appointment of the receiver. Notes given in the prosecution of the business up to that time should be allowed whenever they mature, with the addition or rebate of interest, as in insolvency proceedings. There is no reason why the claim of Skinner, Bartlett, and Company should have priority. The printing and binding for which they claim priority of payment was done in pursuance of a contract with the corporation made in 1896, and not at the request of the receiver nor for the purpose of aiding the court either in keeping the business alive or administering the assets of the corporation. *Decree affirmed.*

FIELD, C. J. I am unable to assent to the opinion of the majority of the court concerning the priority or preference to

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be given to certain debts due from the defendant corporation. There was no statute in force when the suit was commenced, giving priority of one unsecured debt over another, which in terms seems to me applicable to the proceedings. The practice has obtained in the courts of the United States, in cases of receiverships of railroad corporations, particularly in suits brought by mortgagees for a foreclosure, for the court to authorize the payment as preferred debts of certain claims against the railroad company which had accrued before the appointment of the receiver, or before the bill was filed, and these claims have been allowed, not only against income, but sometimes against the corpus of the property in the hands of the receiver. The extent to which this practice has prevailed appears in the cases cited in Beach, Receivers, (Ald. ed.) §§ 394 *et seq.* There is no precedent for any such practice in this Commonwealth. So far as I am aware, this practice has obtained only in receiverships of railroad companies, and the decisions are not uniform upon the specific grounds on which the practice can be justified, or upon the extent to which it should be carried; and the practice has been much criticised. The practice has been defended largely upon the ground of the quasi public nature of railroad corporations, and it has not prevailed in receiverships of private corporations other than railroads. *Wood* v. *Guarantee Trust & Safe Deposit Co.* 128 U. S. 416. *Raht* v. *Attrill*, 106 N. Y. 423. *Merchants' Bank* v. *Moore*, 106 Ala. 646. *Kneeland* v. *American Loan & Trust Co.* 136 U. S. 89. In all the cases of receiverships before this court, so far as appears in the reports, there is no precedent for the allowance against a corporation of debts as preferred when the debts were due at the time when the bill was filed, unless the debts were liens on or were secured by the property of the corporation, or were entitled to a preference by the provisions of some statute applicable to the case, or by the general law. There is, I think, no general power in a court of equity to create a preference of one unsecured debt over another, when the debts existed at the time when the suit was brought, and by the general law were equally entitled to be paid without priority or preference on the part of one over another. Such a power is in its nature a legislative power. A court of equity cannot create rights of property where none previously existed.

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If by the common law of Massachusetts there is a prerogative right of priority in favor of the Commonwealth and of its municipalities for the payment of debts or taxes due them, then the taxes should be preferred; but I doubt if in this Commonwealth either the State, county, or city is entitled to priority of payment for debts or taxes unless it is given by statute, or unless there is a lien on property. It is not contended that any such priority at common law exists in favor of the wages of operatives, clerks, and servants. It seems to me impossible to construe the special provisions of the statutes relating to insolvency concerning preferred debts as intended to be applicable to proceedings under the general equity powers of this or the Superior Court. The provisions of those statutes dissolving attachments made not more than four months before the time of the first publication of the notice, etc., have been held not applicable to proceedings similar to the present. *Kittredge* v. *Osgood*, 161 Mass. 384. *Merrill* v. *Commonwealth Ins. Co.* 166 Mass. 238. Those statutes I think were passed solely with reference to the statutory proceedings in insolvency, and the repeal of those statutes would have no effect upon the present proceedings. The subject in the settlement of estates by receivers is now regulated by St. 1897, c. 400, which was passed after the present suit was begun, and after the time had expired for the proof of claims. Whether in the present case a court of equity should not have declined to take jurisdiction on the ground that the proper remedy was in insolvency I do not consider, as that question is not before the court. See *White* v. *White*, 169 Mass. 52; *Pond* v. *Framingham & Lowell Railroad*, 130 Mass. 194.

It is true that equity usually follows the law in the distribution of legal assets, but by this is meant the general law, whether it be common law or statutory law. Provisions of statute applicable to special proceedings are not a part of the general law. Many of the provisions of our statutes relating to insolvency were in their origin derived from the practice of courts of equity, and in the marshalling of assets and securities equity now often adopts a procedure analogous to the procedure in insolvency. *Commonwealth* v. *Shoe & Leather Dealers' Ins. Co.* 112 Mass. 131. *Merchants' National Bank* v. *Eastern Railroad*, 124 Mass. 518. *Bristol County Savings Bank* v. *Woodward*, 137 Mass. 412.

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Franklin County National Bank v. *First National Bank of Greenfield*, 138 Mass. 515. But that the wages of operatives, clerks, and servants should be preferred is no part of the general doctrine of equity concerning the marshalling of assets and securities. In the administration in equity of the assets of a partnership, although the firm debts are preferred to the individual debts of the partners in the distribution of the firm assets, I am aware of no decision which prefers debts due to operatives, clerks, and servants for wages unless the preference is authorized by statute.

The contention in the present case must be that a court of equity has the power to create preferences in such a suit as the present, according to its opinion of what on the whole is equitable, and that in the exercise of this power it is equitable to follow the statutory provisions relating to estates in insolvency. Pub. Sts. c. 157, § 104. I agree that, if a court of equity has the power in the case of insolvent corporations, there are strong reasons of policy why it should follow in this respect the statutes relating to insolvency, but I have found no authority for the existence of any such power in the case of receiverships of private business corporations, such as the defendant company. I think that, where there is no lien and no statute authorizing priorities which can be construed as applicable to the proceedings, and the priorities are not sanctioned by the general law, debts due to operatives, clerks, and servants for wages are not entitled to priority in proceedings in equity. It has been considered in Massachusetts that, when statutes creating priorities cannot be construed so as to be applicable to proceedings in equity, courts of equity usually follow the maxim that equality is equity. *Commonwealth* v. *Phœnix Bank*, 11 Met. 129. *Cochituate Bank* v. *Colt*, 1 Gray, 382. *Ellis* v. *Boston, Hartford, & Erie Railroad*, 107 Mass. 1. *In re Heywood*, [1897] 2 Ch. 593. *Lyon* v. *Guthard*, 52 Mich. 271. *In re Ranger*, 26 N. Y. Supp. 866. See *American Loan & Trust Co.* v. *Northwestern Guaranty Loan Co.* 166 Mass. 337.

Justices ALLEN and MORTON concur in this dissent.

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ELIZA B. YOUNG, administratrix, *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

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Suffolk. January 12, 1898. — May 17, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Due Care — Negligence — Death — Statute — Passenger.

A person who runs across a railroad track from the station to the opposite platform on the walk provided for passengers, in front of an approaching train, which is in plain sight and which he must see, and by which he is struck and injured, is not in the exercise of due care.

In an action against a railroad corporation, under Pub. Sts. c. 112, § 212, for causing the death of a person who was a passenger, there was evidence tending to show that he crossed a railroad track from the station to the opposite platform on the walk provided for passengers in order to take an approaching train for Boston; that the platform was narrow and the space insufficient for the accommodation of passengers who were accustomed to use it in taking trains; that on this occasion the platform was crowded with passengers who intended to take the train; that he got one foot on the platform when he was struck by the train, being somewhat obstructed by the crowd, and but for the crowd might perhaps have saved himself; that the platform was so constructed that the locomotive and cars running on the track next to it overhung the edge of the platform; and that the approaching train was running at an extraordinary rate of speed up to and beyond the walk referred to. There was also evidence tending strongly to show that he had not abandoned his intention of taking the train and of proceeding in it. *Held*, that the intestate was a passenger within the meaning of the statute, and that there was evidence for the jury of the negligence or carelessness of the corporation, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business.

TORT, by the administratrix of Wilbur R. Young, for his conscious suffering, and, under Pub. Sts. c. 112, § 212, for causing his death.

Trial in the Superior Court, before *Mason*, C. J., who, at the close of the evidence, ruled that the action could not be maintained, and directed a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

The case was argued at the bar in January, 1898, and afterwards was submitted on briefs to all the justices.

A. A. Strout & R. W. Bartlett, for the plaintiff.

J. H. Benton, Jr. & C. F. Choate, Jr., for the defendant.

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FIELD, C. J. There are four counts in the declaration, some of which are counts at common law, and the others are counts under Pub. Sts. c. 112, § 212, in one of which at least it is alleged that the plaintiff's intestate was a passenger.

We are of opinion that the evidence does not show that the plaintiff's intestate was in the exercise of due care. He ran across the tracks from the station to the platform, in front of an approaching train, which was in plain sight and which he must have seen. This consideration disposes of all the counts except those brought under Pub. Sts. c. 112, § 212, in which it is alleged that the plaintiff's intestate was a passenger.

Whether there was evidence for the jury that the plaintiff's intestate at the time he was injured was a passenger, within the meaning of Pub. Sts. c. 112, § 212, is a question of more difficulty. The justice presiding at the trial appears to have been of opinion that the decision in *Webster* v. *Fitchburg Railroad*, 161 Mass. 298, shows that the plaintiff's intestate was not a passenger at the time he was injured. The question whether a person who intends to take a train, but has not taken it, has become a passenger, has been considered in many cases, but not often with reference to this particular statute. The plaintiff's intestate undoubtedly was a passenger in the sense that he had a right to be at the station and to cross the tracks to the platform on the other side, and the railroad company, we think, owed him the duty which it owed to passengers generally, to provide suitable accommodations and safe and convenient ways of access to the train. While he was at the station, he was under that protection which railroad corporations owe to all persons who arrive at a station intending to take a train. *Warren* v. *Fitchburg Railroad*, 8 Allen, 227. *Dodge* v. *Boston & Bangor Steamship Co.* 148 Mass. 207. *Jordan* v. *New York, New Haven, & Hartford Railroad*, 165 Mass. 346. It is plain, we think, that the plaintiff's intestate had presented himself at the proper place, — the place provided by the railroad for passengers, — intending to take the train when it arrived. In this respect the case differs from *Webster* v. *Fitchburg Railroad*, *ubi supra*.

In *Merrill* v. *Eastern Railroad*, 139 Mass. 252, and in *McKimble* v. *Boston & Maine Railroad*, 139 Mass. 542, it was held that a passenger continues to be a passenger, within the meaning of

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Pub. Sts. c. 112, § 212, while crossing the premises of the railroad company to get upon the street after rightfully leaving a train stopping at a station. The effect of the decision in *Warren* v. *Fitchburg Railroad*, *ubi supra*, as applied to the facts stated in the exceptions in the present case is that, if the plaintiff's intestate had a ticket for the passage to Boston, he was a passenger while passing from the station across the track to the platform for the purpose of taking the train for Boston. One object of the statute now incorporated in Pub. Sts. c. 112, § 212, is said to be the punishment of a railroad company for negligently causing the death of a passenger. *Commonwealth* v. *Boston & Lowell Railroad*, 134 Mass. 211.

England v. *Boston & Maine Railroad*, 153 Mass. 490, *Young* v. *Old Colony Railroad*, 156 Mass. 178, *Connolly* v. *New York & New England Railroad*, 158 Mass. 8, and *Winslow* v. *Boston & Maine Railroad*, 165 Mass. 264, were actions at common law, in which the plaintiffs were injured, not killed.

We think that in the Pub. Sts. c. 112, § 212, the word "passenger" must be held to have its customary meaning, and that under our decisions there was evidence that the plaintiff's intestate had become a passenger at the time he was injured. The evidence tends strongly to show that he had not abandoned his intention of taking the train, and of proceeding in it to Boston.

Was there evidence for the jury of the negligence or carelessness of the corporation, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business? We think that there was. There was evidence that the platform was narrow and the space insufficient for the accommodation of the passengers who were accustomed to use the platform in taking inbound trains; that on this occasion the platform was crowded with passengers who intended to take the train; that the plaintiff's intestate got one foot on the platform, but was somewhat obstructed by the crowd, and but for the crowd might perhaps have saved himself; that the platform was so constructed that the locomotive and cars running on the track next to it overhung the edge of the platform; and that the approaching train was running at an extraordinary rate of speed up to and beyond the walk along which the passengers were expected to go across the track to take the train. We

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are of opinion that the case should have been submitted to the jury on the counts under Pub. Sts. c. 112, § 212, in which it is alleged that the deceased was a passenger.

For these reasons, in the opinion of a majority of the court, the *Exceptions should be sustained.*

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TIMOTHY O'BRIEN *vs.* JEROME B. LOOK & another.

Suffolk. January 17, 1898. — May 17, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Employers' Liability Act — Superintendence — Negligence — Evidence — Wages — Damages — Expert.

At the trial of an action under the employers' liability act, evidence that a foreman of the defendant employed and discharged men, that he had seventeen or eighteen men working under him and subject to his orders as to the time of beginning and quitting work and as to the manner of its performance, and that he received higher wages than the others because he was the boss or foreman, is sufficient to show that his principal duty in the service of the defendant was that of superintendence.

The fact that a foreman is paid higher wages than the ordinary laborers is a circumstance to be considered in connection with other evidence upon the question whether his sole or principal duty is that of superintendence.

At the trial of an action for personal injuries occasioned by the falling of a fore and after, so called, through the hatch of a vessel into the hold below, and striking the plaintiff, evidence that the plaintiff had been ordered by the defendant's superintendent to spread a tarpaulin over a part of the cargo in the hold to protect it from falling rain; that other laborers with a winch undertook to ship the fore and after over the combings of the hatch; that in so doing they attached to it the fall of the winch, whereupon the superintendent told the man in charge of the winch to go ahead; that, as the winchman started it, the whelps on the barrel of the winch slipped because it was wet; that the superintendent then took the bite of the fall on the winch head, took three turns, and lifted the fore and after over the combings; and that when some one called out to lower, he unwound the rope from the drumhead with his own hands in such a way that he could not control the fore and after, and it fell on the plaintiff, is sufficient to show negligence of the superintendent in the performance of his duty as superintendent.

In an action for personal injuries received by the plaintiff while in the employ of the defendant, the wages that the plaintiff was receiving as an employee at the time of the accident may be shown as bearing on the question of damages.

At the trial of an action for personal injuries occasioned by the fall into the hold of a vessel of a fore and after, which the servants of the defendant were attempting

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to place over the combings of the hatch, an expert may answer a hypothetical question as to whether the method adopted of lowering the fore and after was proper.

TORT, under the employers' liability act, St. 1887, c. 270, for injuries sustained by the plaintiff while in the employ of the defendants. Trial in the Superior Court, before *Dewey*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff testified that at the time of the accident in June, 1894, he was working for the defendants in the hold of the vessel British Queen, having been employed by one Lowrey, the foreman, to assist in unloading the vessel; that Lowrey had the care of the hatch where the plaintiff was working and the hiring of the help who worked at the hatch; that he ordered the men to go to work wherever he wanted them to, and his directions were obeyed; that he employed and discharged the men, and that the plaintiff never saw anybody else giving directions; that at the time of the accident he was, in obedience to the order of Lowrey, in the hold of the vessel directly under the opening of the forward hatch, about thirty or thirty-five feet from the surface of the deck, spreading a tarpaulin over some flour to keep off the rain, and while so doing he was struck by something. He also testified what wages he was receiving when he was injured.

One Lynch testified for the plaintiff that he was employed by Lowrey to run the winch on the ship; that Lowrey gave orders to the men, who would not begin work without them; that just before the accident it was raining, and he heard some one on deck say, "Come up and put on the hatches"; that the fore and after, which is of iron, weighing five or six hundred pounds, and is used to lower the hatches on when they are closed, was being lowered by the winch; that the whelps or staves on the barrel of the winch did not work well; that they went around the barrel and independent of it with the weight of the fall; that the hatchman came behind the witness, who was assisting in lowering the fore and after, and took up the slack as he reversed the winch, while the foreman, standing in front of him, took the bight and wound it around the winch end and held on to it; and that when the witness turned his head he saw the fore and after going through the combing of the hatch.

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On cross-examination he testified that the hatchman who set the winch in motion and usually gave him his orders about lifting the winch, and was giving orders until he left the hatch and went behind the witness, did not give orders to lower the fore and after into the hold; that the hatchman turned on the steam just before the accident and the whelps moved around; that the hatchman then took hold of the slack and was pulling it as he was reversing the winch and unwinding it off the whelps, while Lowrey wound the fall around the drumhead all the time he was getting ready to heave the fore and after; that they then started to lower the fore and after, Lowrey having hold of it, and that it struck the combing of the hatch and did not get into the socket: and that some one, the witness could not say who, called out, "Look out below."

One McCarthy testified for the plaintiff that he worked for the defendants and was employed by Lowrey, who, just before the accident, gave orders to throw a tarpaulin into the hold, and ordered some of the men to spread it over the flour; that the witness, without orders, put the fall around the fore and after, which had to go on before the hatches could be put on; that the winch could not hoist it over the combings because the whelps inside it were loose, so they hauled off the fall of the drum sufficiently to take it around the drumhead; that he saw Lowrey putting the fall around the winch head several times; that the witness went ahead on it then and lifted the fore and after over the combings, holding it at the end nearest the winch with another man at the other end, when Lowrey lowered the slack of the fall off the drumhead, and down it went into the hold; and that the witness could not hold it because it was too heavy.

Other witnesses called by the plaintiff testified in substantially the same manner as to the duties and conduct of Lowrey, and as to the manner of the accident.

An expert in the manufacture and use of cranes, derricks, and winches was permitted, subject to the exception of the defendant, to testify for the plaintiff that it was not a proper method in the rain to wind the fall around the drumhead, and with a man holding the fall to attempt to lower the fore and after, since when the winch head was wet it became slippery, causing the whelps to slip; and that if the end of the rope had been se-

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cured to the drum the whelps would not have slipped, and there would have been no occasion to put the fall on the drumhead.

One Quinn testified for the defendants that at the time of the accident he was a general superintendent of the defendants, who employed eighty or ninety men; that seventeen or eighteen of them worked under the orders of Lowrey, the foreman, who, in the absence of the witness, was superintendent over his men with full power; and that his chief duty was to see that the men did their work properly, help to rig, give directions, and employ and discharge men. On cross-examination he testified, subject to the exception of the defendants, that Lowrey was paid higher wages than the other men because he was boss or foreman.

Lowrey testified for the defendants that he had been employed by them for ten years, doing every kind of work on the wharf and in the hold, tending the winch, and directing the men; that just before the accident he sent the men down into the hold to spread the tarpaulin; that some of the men put on the fore and after, and when he told the winch man to go ahead the whelps on the barrel of the winch slipped; that he then took the bight of the fall on the winch head, took three turns, and lifted the fore and after over the combings; that somebody then called out to lower quick; and that he then lowered the fore and after and threw the turns off the winch head, and as he threw the turns off he had the last turn in his hand holding the bight, and away went the fore and after, because it was not properly entered in the sockets.

This was all the material evidence in the case, at the close of which the defendants requested the judge to rule: "1. That upon all the evidence the plaintiff could not recover. 2. There is no evidence to go to the jury of any defect in the ways, works, and machinery. 3. There is no evidence to be submitted to the jury that Lowrey's sole or principal duty was that of superintendent. 4. There is no evidence to be submitted to the jury that the accident was caused by an act of superintendence."

The judge declined so to rule, but gave full instructions to the jury on the subject mentioned in the requests, to which no exceptions were taken except so far as they were inconsistent with the requests.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

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The case was argued at the bar in January, 1898, and afterwards was submitted on briefs to all the justices.

J. Lowell, for the defendants.

J. E. Cotter, (*J. W. McAnarney* with him,) for the plaintiff.

KNOWLTON, J. The bill of exceptions recites that, at the close of the evidence, the defendants' counsel presented four requests for rulings, of which the second is as follows: "There is no evidence to go to the jury of any defect in the ways, works, and machinery." The defendants' brief contains the same recital in the same words, and then says, "The second request the court gave, and refused to give the other three, to which the defendants duly excepted, and pray that their exceptions may be allowed." The defendants' argument is confined to the exceptions to the refusal to give the other three rulings requested. In the bill of exceptions it is said that the judge refused to give the rulings requested, but that he gave full instructions on the subjects mentioned in the requests, to which no exceptions were taken, except so far as they were inconsistent with the requests. We are in doubt as to what instruction was given in regard to the subject of the second request, but we think we are justified in acting upon the admission of the excepting party, and in assuming that the inaccuracy is in the bill of exceptions rather than in the defendants' brief, which admits that there was no exception on this part of the case, and makes no argument or request in regard to it.

The questions argued by the defendants are whether there was evidence to charge them on the ground of negligence of their superintendent in the performance of his duty as superintendent, and whether there was error in the admission of evidence against their objection.

1. There was ample evidence, which need not be stated, to show that Lowrey was a person whose principal duty in the service of the defendants was that of superintendence.

2. The difficult question in the case is whether there was evidence that his negligence in the performance of his duty as superintendent caused the accident, or contributed to it. The evidence is undisputed that the work at the time and place of the accident was being done under his immediate personal direction and superintendence. There is no doubt that the plaintiff

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was in the exercise of due care. Is there any evidence of negligence on the part of Lowrey? If there is, do we find any evidence that his negligence was in the capacity of superintendent?

It may be that the men whose duty it was to put the fore and after into its socket when it was lowered were negligent. Whether they were or not does not distinctly appear. However that may be, we think there was evidence of negligence in lowering the fore and after in the manner described, so that if it failed to enter its socket it would fall on the men below. Not only was Lowrey responsible for the method adopted to do the work, and for the directions given to the other men there, but he with his own hands unwound the rope from the drumhead to lower the fore and after in such a way that he could not control the iron as it was being lowered, and so it fell upon the plaintiff. We have no hesitation in saying that there was evidence of negligence on the part of Lowrey. The defendants contend that his negligence, if any, consisted in unwinding the rope from the drumhead, which was work ordinarily done by a mere employee, and not that of a superintendent. If his only connection with the accident were in this act of manual labor, we should be inclined to adopt the defendants' view. But he had determined upon the method of putting the fore and after in place, and had given directions which made his act of unwinding the rope in its wet condition dangerous to the men below. See *McCauley* v. *Norcross*, 155 Mass. 584. We are of opinion that the part of the work which he did with his hands must be considered in connection with his relations to the work as superintendent, and that we cannot separate it from the other conditions for which he was responsible by supervising and giving orders. A majority of the court are of opinion that there was evidence for the jury on this branch of the case.

The wages that the plaintiff was receiving as an employee at the time of the accident might properly be shown as bearing upon the question of damages. *Murdock* v. *New York & Boston Despatch Express Co.* 167 Mass. 549. *Harmon* v. *Old Colony Railroad*, 168 Mass. 377.

The fact that Lowrey was paid higher wages than an ordinary laborer was a circumstance to be considered in connection with the other circumstances upon the question whether his sole or

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principal duty was that of superintendence. In many cases it would have little or no significance; but while alone it would prove nothing, it was proper for the consideration of the jury in the form in which it was stated, and in connection with other evidence bearing upon the question.

The expert was rightly allowed to answer the hypothetical question whether a certain method of lowering the fore and after, which the evidence tended to show was adopted in this case, was a proper method. *Exceptions overruled.*

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AUGUSTUS HEMENWAY & others, trustees, *vs.* AUGUSTUS HEMENWAY & another, executors, & others.

Suffolk. January 25, 26, 1898. — May 17, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Will — Trust — Apportionment of Rents and Income.

In creating a trust by will for the benefit of his widow and three children, the testator carefully provided for the effect of her death or of that of any one of the children upon the distribution of the net rents and income. The payments were to be made from time to time out of the rents and income collected by the trustees, semiannually, reckoning from the death of the testator, and each payment was to be made "to such of the said four persons, namely, my wife and three children, as may be living at the time of payment, and to the lawful issue then living of any my child who has then deceased," etc., and "shall be made either into the hand of the person named, or upon his or her written order, or receipt, given at or after the time, and not by anticipation or in compliance with any assignment." These four persons were not given by the will any interest in the rents and income except the right to receive these semiannual payments in the manner directed. If any one of them was not alive at the time when the payment should be made, only those living at that time were to receive the payment, and they were to receive all that was then payable. *Held*, on the death of the widow, that the net rents and income of the trust property received by the trustees after the date of the semiannual period of payment next preceding the date of the widow's death were not to be apportioned.

BILL IN EQUITY, by the trustees under the will of Augustus Hemenway, to obtain the instructions of the court. Hearing before *Allen*, J., who reserved the case upon the bill and the

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answers for the consideration of the full court. The facts appear in the opinion.

S. Lincoln, for the executors under the will of Mrs. Hemenway.

J. B. Warner, for the children of the testator.

FIELD, C. J. This is a bill in equity for instructions brought by the trustees under the will of Augustus Hemenway, late of Milton in this Commonwealth. Augustus Hemenway, the testator, died on June 16, 1876, leaving a widow, Mrs. Mary Hemenway, and three children by her, viz. Augustus Hemenway, Amy H. Cabot, and Edith H. Eustis. His will was admitted to probate on July 26, 1876. Mrs. Mary Hemenway died testate on March 6, 1894, leaving the same three children. The question presented relates to the payment of the income of the property held in trust under the seventh article of the will of Augustus Hemenway. The trust was composed of all the residue and remainder of his property intended to be disposed of by the will. The trustees were "to collect the rents and income of said trust property, original and substituted, and after deducting the expense of taxes, insurance, and repairs, and all other necessary and proper charges and expenses, including a reasonable compensation for their own services, to dispose of the remaining or net rents and income as is hereinafter provided." The trust was to continue "during the lives of my said wife and my said three children, and of the survivor or longest liver of them, and for twenty years next after the death of such survivor or longest liver; and upon the expiration of the said twenty years, my trustees shall convey in fee simple, transfer, and pay over the said trust property to my lawful issue then living, they taking by representation according to the stocks," with a proviso for the termination of the trust if on the decease of the survivor or longest liver of said four persons, or at any time within the said twenty years next thereafter, all the lawful issue of the testator should be extinct. The testator then makes provision for the payment of certain annuities out of the net rents and income of the trust property, and he directs that "the said annuities shall begin to run from my death, and shall be paid in equal semiannual payments, and the first payment thereof to be made at the end of six months next after my death." After the payment of these annuities the testator

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directs his trustees as follows: "To pay all the remaining net rents and income, during the continuance of this trust, by semi-annual payments in every year, in equal shares, to such of the said four persons, namely, my wife and three children, as may be living at the time of payment, and to the lawful issue then living of any my child who has then deceased, (whether such my child have died before or after me,) such issue taking by representation, according to the stocks, the share which such my deceased child would have taken if living. All payments of net rents and income made under the trusts created for the benefit of my wife, children, and issue, shall be made either into the hand of the person named, or upon his or her written order, or receipt, given at or after the time, and not by anticipation or in compliance with any assignment; and all payments to women shall be made to their several sole and separate use, free from all marital claim or right. My trustees, at the time of making every such semiannual payment, shall render to the persons receiving the same a particular statement and account of all receipts and disbursements of income for the six months then last past."

In accordance with these directions the trustees made payments, and rendered their accounts to the widow and children, every six months after the testator's death, the semiannual period closing at midnight on June 15 and on December 15 of each year, and these payments and accounts included only income actually received during the semiannual period covered. In this way the trust was uniformly administered from the first payment made in December, 1876, until the payment made in December, 1893. The widow having died on March 6, 1894, there has been no payment to her or her estate since the regular semiannual payment of the preceding December.

The trust property was invested in real estate, coupon bonds, promissory notes with interest payable semiannually secured by mortgages, and certificates of stock in corporations, and there was income accruing on December 15, 1893, which had not then accrued and become payable, but which became payable thereafter, and was paid to the trustees before the death of Mrs. Hemenway; and at the time of her death there was also income accruing which had not then accrued and become payable, but

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which after her death became payable and was paid to the trustees. The trustees ask the court to determine whether any income collected by them after December 15, 1893, the date of the last payment to Mrs. Hemenway, should be paid to the executors of her will; and if so, how shall the share of the income be apportioned as between her estate and the three children, — whether as of December 16, 1893, or as of March 6, 1894.

The common law is declared in *Dexter* v. *Phillips*, 121 Mass. 178; but the subject in this Commonwealth is regulated by Pub. Sts. c. 136, §§ 24, 25. Section 25 is as follows: "If the person entitled to such annuity, rent, interest, or income dies, or if such contingent event happens at an intermediate time before the termination of a year from the time when the whole of the annual amount for the preceding year has become due, such annuity, rent, interest, or income for the then current year shall be apportioned, and such person, or his representatives, shall be entitled to receive a proportionate part thereof, unless it is otherwise provided in such will or instrument; but no suit for the recovery of such annuity or interest shall be brought against an executor until the expiration of one year after his giving bond for the discharge of his trust." See *Adams* v. *Adams*, 139 Mass. 449.

Under this section of the statutes, the intention of the testator, when clearly expressed in his will, must be carried into effect, even although the provisions of the will differ from those of the statute. The language of the seventh article of the will seems to us carefully to provide for the effect of the death of the testator's widow, or of any one of his children, upon the distribution of the net rents and income. The payments are to be made from time to time out of the rents and income collected by the trustees, semiannually, reckoning from the death of the testator, and each payment is to be made "to such of the said four persons, namely, my wife and three children, as may be living at the time of payment, and to the lawful issue then living of any my child who has then deceased," etc., and "shall be made either into the hand of the person named, or upon his or her written order, or receipt, given at or after the time, and not by anticipation or in compliance with any assignment." These four persons are not given by the will any interest in the rents and

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income, except the right to receive these semiannual payments in the manner directed. If any one of them is not alive at the time when the payment should be made, only those living at that time are to receive the payment, and they are to receive all that is then payable. The language used seems to us necessarily to exclude any apportionment between the estate of the widow and the three children. The trustees should be instructed that there should be no apportionment of the net rents and income of the trust property received by them after December 15, 1893.

Decree accordingly.

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CHARLES C. GILMAN *vs.* JAMES E. GILMAN.

Suffolk. March 3, 1898. — May 17, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Quieting Title — Statute.

Where it appears that the petitioner was a purchaser of land at a sale on execution against the former owner and received a sheriff's deed, that the time for redemption has expired, that no defect in the proceedings relating to the sale or in the sheriff's deed are shown, and that no conveyance or assertion of claim to the land has been made by the former owner, the petitioner alleging that the former owner has disappeared and that his residence is unknown to the petitioner, who has reason to believe that he will not return, the petitioner's title does not appear to be clouded by an adverse claim or by the possibility of such claim, within the meaning of St. 1893, c. 340, entitled "An Act relative to quieting title to real estate."

PETITION, filed August 10, 1896, under St. 1893, c. 340, entitled "An Act relative to quieting title to real estate," to remove a cloud upon the title to certain land in Chelsea. Hearing before *Morton*, J., who ruled that the petitioner had not shown such a possibility of an adverse claim as to entitle him to a decree, dismissed the petition, and, at the request of the petitioner, reported the case for the consideration of the full court. The facts appear in the opinion.

The case was argued at the bar in March, 1898, and afterwards was submitted on briefs to all the justices.

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W. Soren, for the petitioner.

No counsel appeared for the respondent.

ALLEN, J. The petitioner was a purchaser of the land in question at a sale on execution against the former owner, and received a sheriff's deed. The time for redemption has expired. No defect in the proceedings relating to the sale or in the sheriff's deed is shown. No conveyance or assertion of claim to the land has been made by the former owner. But the petitioner brings this petition to quiet his title, under St. 1893, c. 340, averring that the former owner disappeared from this Commonwealth prior to September 8, 1892; that his residence is unknown to the petitioner, who has reason to believe that he will not return; and that the petitioner's record title is clouded by the possibility that said former owner, or some one claiming under him, may make and maintain a claim in law or in equity adverse to the petitioner's, based upon some alleged defect in said deed, or in the proceedings authorizing the same.

No case is cited to us, and after some examination we have found none, in which a mere apprehension of this kind, when no defect or irregularity can be pointed out, has been held to constitute a cloud on the title. Various definitions of such a cloud have been attempted, but none so far as we have seen embraces a case like this. See Black's and Abbott's Law Dictionaries, and 6 Am. & Eng. Encyc. of Law, (2d ed.) 149 *et seq.*, where many decisions are collected. They all agree, in effect, that in order to constitute a cloud there must at the least be something which can be pointed out, and which has some appearance of furnishing a valid objection to the petitioner's title. See, for examples, *Pixley* v. *Huggins*, 15 Cal. 127; *Lick* v. *Ray*, 43 Cal. 83; *Parker* v. *Shannon*, 121 Ill. 452; *Rigdon* v. *Shirk*, 127 Ill. 411; *Detroit* v. *Martin*, 34 Mich. 170; *Welden* v. *Stickney*, 1 App. Cas. (D. C.) 343; *Rea* v. *Longstreet*, 54 Ala. 291, 294; *Lytle* v. *Sandefur*, 93 Ala. 396; *Thompson* v. *Etowah Iron Co.* 91 Ga. 538. And it has been expressly declared that mere apprehension as to the validity of a title, or even oral assertions of a hostile claim, will not sustain a bill to quiet the title. *March* v. *England*, 65 Ala. 275, 284. *Borst* v. *Simpson*, 90 Ala. 373, 376. See also *Farnham* v. *Campbell*, 34 N. Y. 480.

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A similar view has been taken in this Commonwealth. In *Nickerson* v. *Loud*, 115 Mass. 94, it was held that a paper signed by A. and recorded in the registry of deeds, giving notice that certain real estate held by B. is claimed to be held subject to a trust in favor of A., and that A. will dispute any title that B. may attempt to make, does not constitute a cloud upon B.'s title. In *Leeds* v. *Wheeler*, 157 Mass. 67, a similar doctrine was held. In *First African Methodist Episcopal Society* v. *Brown*, 147 Mass. 296, it was held that the recording of a somewhat similar paper constituted no cloud upon a title, and would not entitle a purchaser to refuse to fulfil his contract of purchase. See also *McNeil* v. *Ames*, 120 Mass. 481. In other cases, a mere possible objection to the validity of a title has not been allowed to exempt a purchaser from the duty of completing his purchase. *Hayes* v. *Harmony Grove Cemetery*, 108 Mass. 400. *Dow* v. *Whitney*, 147 Mass. 1. *Carr* v. *Richardson*, 157 Mass. 576. *Cushing* v. *Spalding*, 164 Mass. 287. See also *Cambrelleng* v. *Purton*, 125 N. Y. 610. A purchaser is excused where there is a reasonable doubt. *Loring* v. *Whitney*, 167 Mass. 550, and cases there cited.

In the present case, the proceedings under which the petitioner derived his title are all a matter of record, and his careful examination of them discloses no defect or irregularity. So far as appears, there is no more doubt as to the validity of his title than there is in every case where land is sold on an execution against the owner of it. The apprehension which the petitioner feels, with nothing which can be pointed out for it to rest upon, is not, in the opinion of a majority of the court, the possibility of an adverse claim, within the meaning of the statute. The facts in the cases of *Loring* v. *Hildreth*, 170 Mass. 328, and *Loring* v. *Whitney*, 167 Mass. 550, furnish an illustration of a cloud within the statute.

Petition dismissed.

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GEORGE POOLE *vs.* MASSACHUSETTS MOHAIR PLUSH COMPANY & others.

Middlesex. March 4, 7, 1898. — May 17, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Construction of Contract — Parol Evidence.

On March 27, 1891, A. entered into a written agreement with the B. Co. by which it was to construct for him a certain loom to be approved by C., and on such approval the company was to construct thirty-six more looms at a price to be determined. The agreement then proceeded: "The said B. Co. cannot build said loom . . . for other parties excepting as hereinafter provided. On or before the expiration of five years from this date, said A. shall formally notify said B. Co. of their intention to order to be built a second instalment of thirty-six or more of said looms on or before seven years from this date, and when so ordered, said B. Co. shall not build said looms . . . for any other party for a period of ten years from this date. But in case said A. fail to formally notify said B. Co. on or before the expiration of said five years, said B. Co. shall have the privilege of building said looms . . . for other parties after five years from this date, and shall then be released wholly from the obligations of said ten year term; also said A. shall be released from their obligation to order said second instalment of thirty-six or more of said looms." On November 9, 1891, A. entered into a written agreement with C. to form a corporation and to employ C. therein, and to give him in the event of his dismissal certain royalties "to the full end of the term of the agreement made by and between the parties of the first part (A.)" and the B. Co. *Held*, in an action by C. against A. and the corporation on his dismissal in 1894, no notice having been given by A. to the B. Co. of an intention to order a second instalment of looms and no instalment having ever in fact been ordered, that the term continued until March 27, 1901, and that parol evidence to show that the parties had a different intention was incompetent.

CONTRACT, to recover the amount alleged to be due under the terms of a written agreement made by the plaintiff with Edward P. Bliss and Henry W. Bliss, partners under the firm name of Cushing and Bliss, and by them assigned to the Massachusetts Mohair Plush Company. Trial in the Superior Court, without a jury, before *Gaskill*, J., who found for the plaintiff; and the defendants alleged exceptions. The facts appear in the opinion.

The case was argued at the bar in March, 1898, and afterwards was submitted on briefs to all the justices.

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R. P. Clapp, for the defendants.

W. S. Marshall, for the plaintiff.

ALLEN, J. On March 27, 1891, the two defendants, Edward P. Bliss and Henry W. Bliss, who were partners under the firm name of Cushing and Bliss, entered into a written agreement with the Crompton Loom Works, by which the latter company was to construct for them a pile wire motion loom for weaving plush goods, in such a manner as to meet the approval of Poole, the present plaintiff, who was then in the employment of Cushing and Bliss, and when said loom should be declared correct and satisfactory by Poole the said company was to construct thirty-six more looms at a price to be determined by the parties. The written agreement then proceeded as follows: "The said Crompton Loom Works cannot build said loom for weaving plush for other parties excepting as hereinafter provided. On or before the expiration of five (5) years from this date, said Cushing and Bliss shall formally notify said Crompton Loom Works of their intention to order to be built a second instalment of thirty-six or more of said looms on or before seven (7) years from this date, and when so ordered, said Crompton Loom Works shall not build said looms for weaving plush for any other party for a period of ten (10) years from this date. But in case said Cushing and Bliss fail to formally notify said Crompton Loom Works on or before the expiration of said five (5) years, said Crompton Loom Works shall have the privilege of building said looms for weaving plush for other parties after five (5) years from this date, and shall then be released wholly from the obligations of said ten (10) year term; also said Cushing and Bliss shall be released from their obligation to order said second instalment of thirty-six or more of said looms."

On November 9, 1891, Cushing and Bliss entered into a written agreement with the plaintiff, by which they agreed to form a corporation to be known as the Massachusetts Mohair Plush Company, and to employ Poole as general superintendent, and to pay him a yearly salary at the rate of forty dollars a week, and as additional compensation during the time that he should remain in their employment one fifth of all the profits of the business, after a dividend of ten per cent upon the amount of money actually invested in the business; and he was to assign

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to the Plush Company all his right, title, and interest in the improvements in looms invented jointly by himself and one Wyman, and in letters patent which might be issued thereon, and also any and all improvements which he might make upon said invention while he should remain in the employment of Cushing and Bliss. It was also agreed that Poole might purchase capital stock of said Plush Company to the extent of one hundred and fifty shares, at par, from time to time. The agreement then proceeded as follows: "It is understood and agreed by the parties hereto that if the party of the second part [Poole] shall be dismissed from the employ of the parties of the first part, as general superintendent of the Massachusetts Mohair Plush Company, as aforesaid, or if the party of the second part should die or become disabled by reason of accident or sickness, then the said Massachusetts Mohair Plush Company shall pay to the party of the second part, his heirs or assigns, in lieu of salary and profits, as hereinbefore mentioned, and as a royalty fee for the use of his said improvements in looms, one cent per yard on all goods woven upon the said improved looms, to the full end of the term of the agreement made by and between the parties of the first part and Crompton Loom Works Company of Worcester, Massachusetts, whereby the parties of the first part have acquired full right to use the looms upon which the improvements aforesaid have been wrought, of which agreement the party of the second part hereby acknowledges cognizance, or until the amount so paid as royalty fees, together with any sum or sums previously invested by the party of the second part in the capital stock of Massachusetts Mohair Plush Company as aforesaid shall be sufficient to purchase the said one hundred and fifty (150) shares of the capital stock of the said company."

The plaintiff was dismissed from his position as general superintendent on June 1, 1894; and none of the defendants gave notice to the Crompton Loom Works of an intention to order a second instalment of looms, and no second instalment was ever in fact ordered. The plaintiff was duly paid all sums due to him under the above agreement down to March 27, 1896; and the defendants refused to pay anything afterwards.

The question is, What is the true meaning of the words in the agreement, "to the full end of the term of the agreement made

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by and between the parties of the first part and Crompton Loom Works Company"? Did that term expire on March 27, 1896, or is it to continue until March 27, 1901?

We are of opinion that the latter is the true construction. The said parties of the first part, Cushing and Bliss, had an agreement which ran for their benefit for ten years, if they so desired. It was within their own power or option to have it so continue. The agreement was to last five years, or ten years, according as they themselves might elect or determine. It was therefore an agreement with them, at their election, for the term of ten years. There were two dates fixed at which the agreement might cease. This being so, the words "the full end of the term of the agreement" naturally signify the longer term, and the construction put upon them by the Superior Court was right.

This being the legal effect of the written agreement, parol evidence to show that the parties had a different intention was incompetent. *Marr* v. *Washburn & Moen Manuf. Co.* 167 Mass. 35. *Exceptions overruled.*

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188 [2]130
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195 [1]558
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200 [1]151
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203 [2]456
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203 [1]459
[f]203 [1]458

RICHARD A. WALSH, administrator, *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. November 16, 1897. — May 18, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Due Care — Negligence — Ringing of Bell — Evidence — Burden of Proof.

In an action under Pub. Sts. c. 112, § 212, the plaintiff is bound to show that the deceased was in the exercise of due care, and that the accident happened through the negligence of the defendant or the unfitness or negligence of its servants; and an action cannot be maintained where it is only a matter of conjecture whether a person killed while attempting to drive over a crossing in front of an approaching train looked or listened, before crossing, or took any precautions to ascertain whether a train was approaching, or whether his view was obscured, or he was misled by the lack of signals or warning by the gateman.

In an action under Pub. Sts. c. 112, § 213, the plaintiff is not obliged to show that the deceased was in the exercise of due care, but he is entitled to recover if it appears that the defendant neglected to give the signals required by law, and

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that such neglect contributed to the injury; and the burden is on the defendant to show that the deceased was guilty of gross or wilful negligence.

At the trial of an action under Pub. Sts. c. 112, § 213, evidence that persons did not hear the bell of the engine rung is competent, in connection with other evidence that they had passed over the crossing when the accident occurred, and, after having gone a short distance, had their attention attracted solely by the approaching train, toward which they turned, and watched it as it approached.

At the trial of an action under Pub. Sts. c. 112, § 213, evidence that the accident occurred at half past nine o'clock in the evening; that the deceased when last seen by any one but the gateman was slowly approaching the railroad crossing seated in an open carriage, and driving a safe horse; that his view of the track in the direction from which the train was coming was obstructed; that, although he was familiar with the crossing, he did not know that the train by which he was struck had recently begun running; that the bell of the engine had not been rung nor the whistle blown before approaching the crossing; and that the gateman had given no warning of the approaching train, — is competent for the consideration of the jury on the question of the negligence of the defendant.

TORT, under Pub. Sts. c. 112, §§ 212, 213, by the administrator of the estate of John Walsh, to recover damages for the death of his intestate on August 22, 1895. Writ dated November 15, 1895.

The first count of the declaration alleged that on or about August 22, 1895, at about a quarter past nine in the evening, the plaintiff's intestate was lawfully travelling on Winn Street, a highway in Woburn which is crossed by the railroad tracks of the defendant at grade, and forms a crossing such as is described in Pub. Sts. c. 112, § 163; that while the plaintiff's intestate was in the exercise of due care, and while the gates were raised and there was no indication of danger, he undertook to cross the railroad tracks at such crossing, when he was struck by one of the defendant's locomotive engines and received injuries which caused his death; that the accident happened through the gross negligence, carelessness, and unfitness of the defendant's servants in failing to have the gates lowered when the train was about to cross the street, or in giving proper warning or signals at the crossing.

The second count, after stating the manner of the accident substantially as in the first count, alleged that the accident was caused by the servants of the defendant, who neglected to give the signals when approaching said crossing by bell or whistle as required by Pub. Sts. c. 112, § 163, and that such negligence contributed to the injuries and death of the plaintiff's intestate.

Answer: a general denial.

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Trial in the Superior Court, before *Hardy*, J., who allowed a bill of exceptions in substance as follows.

The plaintiff's intestate was killed at about half past nine o'clock in the evening of August 22, 1895, on the tracks of the defendant, at a place where Winn Street in Woburn crosses the railroad tracks at grade. When last seen by any one but the gateman, he was slowly approaching the crossing and seated in an open two-seated carriage, driving a safe horse, which he had driven for two years before the accident.

The plaintiff introduced evidence tending to show that the railroad and Winn Street cross each other nearly at right angles; that from Winn Street an approaching train cannot be seen until it has passed under a bridge at Kilby Street, distant about four hundred and twenty-five yards; that from the direction in which the deceased approached the crossing no part of the track between Winn and Kilby Streets is visible, until the junction of Winn and Middlesex Streets, about one hundred and sixty feet from the crossing, is reached; and that trees on Middlesex Street, and a bill board and other structures parallel with Winn Street between Middlesex Street and the crossing, obstruct a view of the track.

The plaintiff further introduced evidence tending to show that the crossing was equipped with gates, but that they were not operated later than a quarter past seven in the evening, after which lanterns were hung upon the upraised gates, and the gateman usually signalled the approach of trains by swinging a lighted lantern upon the crossing; that although the gateman was seen outside his gatehouse a few minutes before the accident, no light could at that time be seen either inside or outside the gatehouse, about the crossing or on the gates, and that he gave no light or signal of any kind; and that no whistle was blown by the locomotive between Kilby Street and the crossing, nor within a distance of at least eighty rods from the crossing.

The defendant admitted that at the time of the accident the gates at the crossing were not lowered, and the engineer of the locomotive, called by the defendant, testified that he did not blow the whistle as he had orders not to do so.

Various witnesses called by the plaintiff testified that they were either standing near or approaching the same crossing in an opposite direction from the deceased, had an unobstructed

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view of the crossing and the approaching train, and that they saw no light or lantern swung by the gateman at the crossing, which when the train approached was in darkness.

One Mrs. Curry testified for the plaintiff that on the evening of the accident she and her husband had been with a friend to the railroad station at Woburn Centre, and in returning home they reached the Winn Street crossing just as the train which caused the accident was approaching; that she asked her husband to turn and see the train; and that they stopped and faced the train, had an unobstructed view of it, and her attention was concentrated on it all the time. Both Mrs. Curry and her husband testified that they heard the usual noise of an approaching train, but that they heard no whistle blown or bell rung before the train reached the crossing; and that after it had passed the crossing they turned and went home, unaware of the accident.

One Horner, a gateman of the defendant, testified for the defendant that he attended the gates from half past six in the morning until a quarter past seven at night; that at half past nine he returned and flagged this train, which was an extra and ran regularly only in the summer, with a hand light; that on the night of the accident, when he received the electric signal of the approaching train, he took his white light, crossed the street, stood in the middle of it, and gave the signals to the cars as they were coming down; that he then saw the deceased, perhaps three rods off, coming along quickly in a carriage; that, knowing that the train was coming, he swung the lantern in the horse's face, and said, "You won't have time to cross," or, "You won't have time to go through, you are too close"; that not knowing who was in the carriage he did not take hold of the rein; and that the deceased, replying, "I 'm going through," drove right along and was struck by the engine. On cross-examination he testified that the deceased was driving at a "pretty smart trot, . . . from four to five miles an hour."

One Hill, a fireman, testified for the defendant that as the train approached the crossing he was sitting in his seat on the left hand side of the cab, and had his head out of the side window, and that he saw no light or signal of any kind at the crossing, nor gateman nor lantern, before the accident, but saw the gateman after the accident, and that he then had a lantern. Both

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he and the engineer testified that he began to ring the bell as soon as they passed the Kilby Street bridge, and that they had been running this train only eleven days.

Other witnesses who were driving towards the crossing testified that they saw no light or signal there before the accident.

The foregoing was all the material evidence in the case, at the close of which the judge ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

F. C. Dowd, for the plaintiff.

S. Lincoln & H. W. Ogden, for the defendant.

MORTON, J. Under the first count the plaintiff was bound to show that his intestate was in the exercise of due care, and that the accident happened through the negligence of the corporation or the unfitness or gross carelessness of its servants. We do not understand the plaintiff to contend that there was any evidence tending to show that the corporation was negligent. If, as the evidence tended to show, the gateman gave no signal or warning of the approaching train, we think that the jury would have been justified in finding that he was guilty of gross negligence. *Tilton* v. *Boston & Albany Railroad*, 169 Mass. 253. But we think that the plaintiff did not sustain the burden of showing that his intestate was in the exercise of due care. If the testimony of the gateman is to be believed, it would tend strongly to show that the plaintiff's intestate was guilty of gross negligence. It is possible, however, that the jury might not believe the gateman. If that is laid one side, then there is nothing to show that the plaintiff's intestate as he approached the crossing looked or listened, or took any precautions to ascertain whether a train was coming. It is true that he may have been misled somewhat by the absence of the statutory signals, if those were not given, and by the open gates and the want of a light, and that, if he had looked his view of the approaching train might have been obscured by trees, fences, and buildings. But whether he was misled, or whether he looked or listened, or tried to look or listen, is all a matter of conjecture. Negligence on the part of the servants of the corporation will not excuse negligence on his part. *Butterfield* v. *Western Railroad*, 10 Allen, 532. *Tyler* v. *Old Colony Railroad*, 157 Mass. 336. And the circumstances do not appear to have been such as to excuse him from exercising

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the care which every traveller is bound to exercise as he approaches a railroad crossing. *Chase* v. *Maine Central Railroad*, 167 Mass. 383. *Merrigan* v. *Boston & Albany Railroad*, 154 Mass. 189. *Fletcher* v. *Fitchburg Railroad*, 149 Mass. 127.

Under the second count, the plaintiff was not obliged to show that his intestate was in the exercise of due care. He was entitled to recover if it appeared that the corporation neglected to give the signals required by law, and that such neglect contributed to the injury. The corporation could relieve itself from liability by showing that the plaintiff's intestate was guilty of gross or wilful negligence, and that such negligence contributed to the injury. Pub. Sts. c. 112, § 213. The burden of proof was on the corporation to show this. *Copley* v. *New Haven & Northampton Co.* 136 Mass. 6, 10. The defendant admits that the whistle was not blown, the engineer having had orders not to blow it. We think that there was evidence for the jury on the question whether the bell was rung, the statute being that the whistle must be blown or the bell rung. The circumstances attending the observation of the two witnesses whose testimony principally was relied on to show that the bell was not rung relieve it from the objection which has been found in some other cases to exist to the introduction of similar testimony. The evidence tended to show that they passed over the crossing where the accident occurred, and after having gone a short distance, their attention being attracted by the approaching train, they stopped and turned round and watched it as it approached the crossing. If their testimony is believed, their attention was directed solely to the approaching train. It was not distracted by anything else. Under such circumstances, it cannot justly be said, we think, that, where a witness testifies that he did not hear the bell rung, it is not some evidence that it was not rung. The probability that, if the bell had been rung, it would have impressed itself in some manner on his consciousness, cannot be regarded as so remote, we think, as to render his testimony inadmissible because he is unable to say positively that it was not rung. *Menard* v. *Boston & Maine Railroad*, 150 Mass. 386. *Johanson* v. *Boston & Maine Railroad*, 153 Mass. 57. *Davis* v. *New York, New Haven, & Hartford Railroad*, 159 Mass. 532. *Lamoureux* v. *New York, New Haven, & Hartford Railroad*, 169 Mass. 338.

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The defendant contends that it does not appear that the failure to ring the bell contributed to the accident, and that the plaintiff's intestate was grossly careless. But it is to be presumed that persons approaching a place of danger, like a railroad crossing, ordinarily will pay some attention to signals given for the purpose of warning them of approaching trains. The requirement that signals shall be given is based on this assumption. It is not an unreasonable inference, therefore, that, if there is an accident at a railroad crossing, and the bell was not rung nor the whistle blown, that fact, in the absence of evidence to the contrary, had something to do with it. *Doyle* v. *Boston & Albany Railroad*, 145 Mass. 386.

Passing over the testimony of the gateman, which, as already observed, the jury might not believe, we think that it cannot be held, as matter of law, that the plaintiff's intestate was grossly careless. The accident happened about half past nine in the evening. When last seen by any one but the gateman, the plaintiff's intestate was driving slowly towards the crossing, seated in an open two-seated carriage. The horse was a safe one, which he had driven for two years before the accident. The gates were up, and there was evidence from which the jury might have found that the gateman gave no warning of the approaching train. His view in the direction from which the train was coming was obstructed. Though he was familiar with the crossing, it does not appear that he knew that this train, which had been running only eleven days, had been put on. Taking the situation as the jury might have found it to be, we cannot say that it appears, as matter of law, that he was grossly negligent. *Lamoureux* v. *New York, New Haven, & Hartford Railroad*, 169 Mass. 338, 340. The difficulty under this count is that the defendant has the burden of proof on the question of gross negligence, as the plaintiff has it on the question of due care under the first count. The sections of the statute under which the declaration is drawn make a distinction between the two.

On account of the error in the ruling so far as the second count is concerned, the entry must be exceptions sustained, but the new trial will be limited to the second count.

So ordered.

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ALEXANDER LA FLEUR *vs.* ADONIRAM J. CHACE & others.

Bristol. January 24, 1898. — May 18, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Equity — Mortgage — Bond for a Deed — Foreclosure — Rights of New Intending Purchaser.

Where the title of the obligor of a bond for a deed has been foreclosed by a valid mortgage sale, and the land has been thereafter sold to *bona fide* purchasers, who took for value and without knowledge or notice of the claim of the obligee, he cannot charge a new intending purchaser with any duty to himself by notifying him before his purchase of the facts with reference to the bond for a deed.

BILL IN EQUITY, praying for a conveyance to the plaintiff of certain real estate. The original defendants were Adoniram J. Chace, the owner of the equity, William O'Brien, the holder of the second mortgage, and the Taunton Savings Bank, the holder of the first mortgage. The bill was amended by adding several parties defendant, among them Daniel A. Sullivan.

At the trial, before *Gaskill*, J., the counsel for the plaintiff stated that he did not ask for any decree against the defendants who had not appeared, and that, if the bill was dismissed as to Sullivan, it might be as to all defendants. The judge dismissed the bill, and reported the facts at the request of the plaintiff; and the plaintiff appealed to this court. The facts so reported appear in the opinion.

F. A. Pease, for the plaintiff.

D. F. Slade, for Sullivan and others.

C. A. Reed, for O'Brien.

BARKER, J. The case comes before us upon the plaintiff's appeal from a decree dismissing the bill. The facts found by the judge who heard the case and entered the decree are, in substance, that the plaintiff took a bond for a deed of land which with other lands was subject to mortgage. He paid a part of the purchase money, and gave his notes for the balance to the owner of the equity from whom he took the bond. There was a written agreement between the mortgagee and the obligor by which, under certain circumstances, if there should be no breach

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of the conditions of the mortgage, and if the prices should be satisfactory, the mortgagee would assent to sales of parcels of the mortgaged land to be made by the obligor. After the giving of the bond the mortgage was duly foreclosed for breach of condition, by a sale under a power, and the mortgaged land conveyed to a purchaser, who bought in good faith. Neither the mortgagee nor his vendee knew of the bond for a deed, and the plaintiff, who was present with them at the foreclosure sale, gave them no notice or information that he had any interest in the matter. After the foreclosure sale the purchaser conveyed an undivided half of the land to another person, and these two sold the land to another purchaser, and all the purchasers bought in good faith and without notice of the plaintiff's claim. Some eighteen months after this sale the land was sold to the defendant Sullivan, who bought in good faith; but before he bought the plaintiff told him that he (the plaintiff) had bought the land and would proceed against him if he made the purchase, but gave him no other information.

Upon these facts it is plain that the bill was properly dismissed. Even if the existence of the bond for a deed had been known to the mortgagee, it would not have prevented him from making an effectual foreclosure sale, he not having assented to the bond, and not being bound to assent to it by the terms of his agreement with the obligor. When the mortgage was foreclosed without notice of the existence of the bond, and the land sold to purchasers who bought for value and in good faith and without notice of the plaintiff's claim, all equitable right in the plaintiff to require a conveyance to himself was gone, and it could not be revived by notifying an intending purchaser that the plaintiff held a bond for a deed given before the foreclosure sale. Such a purchaser would take subject to no equitable right of the plaintiff, who can look for redress only to the obligor of his bond. In *Hayward* v. *Cain*, 110 Mass. 273, the foreclosure sale was fraudulent, and, in addition, as also in *Connihan* v. *Thompson*, 111 Mass. 270, and in *Mansfield* v. *Hodgdon*, 147 Mass. 304, there had been no intervening purchasers in good faith and without notice. These cases, on which the plaintiff seems to have relied, are therefore not in point.

Decree affirmed.

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LOUIS C. WILLIAMS *vs.* EAST WAREHAM, ONSET BAY, AND POINT INDEPENDENCE STREET RAILWAY COMPANY & others.

Suffolk. January 24, 1898. — May 18, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Equity — Remedy at Law — Franchise relating to the Receiving of Toll — Attachment — Execution.

A street railway company is a corporation authorized to receive toll within the meaning of Pub. Sts. c. 105, §§ 30–85.

A bill in equity by a judgment creditor, praying for the application of the earnings of a street railway company to the payment of his judgment, the appointment of a receiver, and an injunction to restrain an alleged creditor who has commenced an action from causing to be taken on execution the franchise or other property of the company which he has attached on mesne process, must be dismissed, as the remedy of the plaintiff is by a levy of his execution upon the franchise and the rights and privileges of the company thereunder "so far as [they] relate to the receiving of toll," and upon "all other corporate property real and personal," and a sale thereof pursuant to Pub. Sts. c. 105, §§ 81 *et seq.*; and if, after having levied the execution, the plaintiff or the purchaser at the sale contends that there is nothing justly due from the company to the alleged creditor who has brought suit against the company and attached its property, the plaintiff or such purchaser can proceed at law under Pub. Sts. c. 161, §§ 110 *et seq.*, to try the validity of the attachment.

BILL IN EQUITY, filed August 18, 1897, by a judgment creditor, praying for the application of the earnings of the defendant street railway company to the payment of his judgment, for the appointment of a receiver for that purpose, and for an injunction to restrain William M. Butler and Frederick L. Benson, two alleged creditors who had commenced actions, from causing to be taken on execution the franchise or other property of the company necessary to enable it to perform its public duties, all of which they had caused to be attached on mesne process.

The bill alleged that, on August 2, 1897, the plaintiff recovered judgment in an action brought against the defendant company for $2,014.58 damages and costs of suit. The next day an execution was issued on the judgment, and delivered to a deputy sheriff, who on August 14, 1897, returned to court thereon that there were no goods, chattels, or lands whereof he

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could cause to be satisfied the judgment debt; and the judgment was still in force, and in no part satisfied.

On June 24, 1897, during the pendency of the plaintiff's action, the defendant Butler commenced an action in contract against the company, which was subsequently entered in court, and caused certain tangible personal property of the railway company to be attached, said property so attached being all the horses, harnesses, and tools then belonging to or possessed by the company, and also by the same writ attaching the franchise, and all the rights and privileges thereof of said company. This action was still pending.

On July 2, 1897, the defendant Benson brought an action in contract against the defendant company, which was subsequently entered in court. Benson caused the same tangible personal property to be attached that was attached on the writ in favor of Butler. These actions were both commenced after the verdict was rendered upon which the judgment in favor of the plaintiff against the defendant company was afterwards entered. Butler had been acting as counsel for the company, and Benson, when the bill was brought, was a director and manager thereof. There was no charge that their claims or either of them are fraudulent or dishonest, but the bill alleged that it was the intention of the defendant company to submit to judgments, and that it is the intention of attaching creditors "that the property so attached under color of said writs should be sold under color of executions to be issued upon judgments to be recovered by Butler and Benson, so that the street railway company would be without any means of carrying on its business, or of earning any profits by means thereof, in case proceedings should be instituted by the plaintiff for the application of the earnings to the satisfaction of his judgment." And that it is the further intention of the parties defendant that at such sale the property was to be purchased at a nominal price by and in the names of persons interested in and acting on behalf of the street railway company, upon an understanding that the company might use the same so long as there should be no such proceedings. The bill further alleged that, "in pursuance of said purpose and intention of the said parties," who were the defendants Butler and Benson, and the unrevealed persons "acting for and in behalf of the railway

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company," with whom also must be joined the deputy sheriff making the attachment, "the property so attached by the said deputy sheriff, of which he retained possession, was placed by him in the custody of certain keepers who were servants of the street railway company, designated by said parties for that purpose, and the said street railway company, notwithstanding the said seizures and attachments, is continuing to use said property in its business as if no such attachment had been made."

The bill further alleged that the property attached was substantially all the personal property of the defendant company that is or can be used in its business, that its use was necessary to enable the defendant company to perform the public service for which it was incorporated, and that therefore the sale and transfer of the personal property by the company or under color of any execution or other process of law would be contrary to law and invalid; that the railway was receiving a large amount of earnings above all expenses, and inasmuch as the said street railway and franchise and other property could not be taken on execution, the earnings ought to be taken and sequestered by means of a receiver.

The defendants demurred to the bill, assigning as grounds therefor: 1. want of equity; 2. that the plaintiff had a plain and adequate remedy at law; 3. want of title and interest in the plaintiff; 4. multifariousness.

A. B. Collins, (*T. E. Grover* with him,) for the defendants.

J. L. Thorndike & R. F. Sturgis, for the plaintiff, submitted the case on a brief.

FIELD, C. J. We are of opinion that, on the facts stated in the bill, the plaintiff has an adequate remedy at law. The street railway company is, we think, a corporation authorized to receive toll, within the meaning of Pub. Sts. c. 105, §§ 30–35. In this respect, we cannot distinguish it from a railroad corporation. See Pub. Sts. c. 113, §§ 43 *et seq.*; *Simmons* v. *Worthington*, 170 Mass. 203. The remedy of the plaintiff is therefore by a levy of his execution upon the franchise of the company and upon the rights and privileges of the company thereunder, "so far as [they] relate to the receiving of toll," and upon "all other corporate property real and personal," and by a sale thereof pursuant to Pub. Sts. c. 105, §§ 31 *et seq.* After having levied the execu-

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tion, if the plaintiff or the purchaser at the sale contends that there is nothing justly due from the company to Butler or to Benson, who have brought suits against the company and attached its property therein, the plaintiff or such purchaser can proceed under Pub. Sts. c. 161, §§ 110 *et seq.*, to try the validity of the attachments in those suits.

Demurrer sustained, and bill dismissed.

CHARLES R. EVANS *vs.* KATE L. STRACHAN-HANSCOM.

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171 64
d194 106

Suffolk. January 28, 1898. — May 18, 1898.

Present: FIELD, C. J., ALLEN, LATHROP, & BARKER, JJ.

Equity — Specific Performance — Law and Fact.

Where an appeal is taken from a decree of a justice of the Superior Court dismissing a bill in equity, and there are no rulings of law or findings of fact by the justice making the decree, the only question for this court is whether such decree could properly have been entered upon any view which the presiding justice might have taken of the evidence.

Where a bill in equity was brought for the specific performance of a written agreement for the conveyance of real estate, the testimony showed that the agreement was signed by the defendant and placed by him in the hands of an intervening broker, by whom it was subsequently handed to the plaintiff, and the evidence upon the question whether the delivery of the agreement was authorized by the defendant was conflicting. The presiding justice made a decree dismissing the bill, and made no finding of fact or ruling of law. *Held*, that it could not be said as matter of law that upon the evidence the presiding justice properly could not enter a decree dismissing the bill with costs.

BILL IN EQUITY, for the specific performance of a written agreement to convey real estate. The case was heard in the Superior Court, by *Richardson*, J., who entered a decree dismissing the bill; and the plaintiff appealed to this court. The material facts are stated in the opinion.

W. D. Turner, for the plaintiff.

J. R. Murphy, for the defendant.

BARKER, J. The plaintiff asks to have the defendant compelled to perform an agreement by which he alleges she was

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to convey to him a parcel of land in exchange for his equity in another parcel. The case has been heard by a judge of the Superior Court, who has entered a decree dismissing the bill, and it comes here upon the plaintiff's appeal from that decree. The evidence was taken by a commissioner, whose report of the evidence is before us. There are no rulings of law or findings of fact. The question for decision is whether a decree dismissing the bill could properly have been entered upon any view which the presiding judge might have taken of the evidence.

The plaintiff is a real estate broker, as well as a dealer in real estate. The defendant is married to a second husband. The negotiations out of which the suit arises were carried on by another real estate broker, who has received a commission from the defendant, and who claims one from the plaintiff also; and at the hearing the plaintiff testified that he could pay the bill for the commission.

The plaintiff's counsel contends that the bill was dismissed upon the ground that the plaintiff knew when he brought the bill that the defendant could not give a good title to the land which she had contracted to convey, while the defendant chiefly relies upon the fact that the instrument which she signed was never delivered to the plaintiff.

There is nothing in the record to show to us what facts were found, or whether the decree was entered upon either of these grounds. The only evidence as to the value of the plaintiff's equity was to the effect that it was worth $5,000. There was considerable testimony as to the value of the land to be conveyed in exchange, and the highest price put upon it by any witness was $4,400, so that, upon the evidence, the failure of the defendant to perform her agreement, if she made one, was not pecuniarily disadvantageous to the plaintiff.

There is at least one view which the presiding judge may have taken of the evidence which would justify his decree dismissing the bill. The written agreement binding the defendant to the bargain was signed by her on a Saturday, and was then placed by her in the hands of the intervening broker, by whom it was handed to the plaintiff on the following Thursday. The defendant contended that it was not placed in the broker's hands for delivery to the plaintiff, and that she never authorized its de-

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livery, and upon this point the evidence was conflicting. While the presiding judge might doubtless have found that the agreement was delivered under the defendant's authority, or that its delivery was subsequently ratified, such a finding is not the only reasonable one which can be made. The defendant testified that the broker came to her place about seven o'clock on Saturday evening and stayed until after nine, and that she told him that she preferred waiting until Tuesday until after her husband had signed, and that the broker told her to sign the paper that night, and that he would not give up the paper. This was wholly denied by the broker, and it is plain that either he or the defendant testified to an untrue account of what occurred when the agreement was signed by the defendant and was handed to the broker. Two other witnesses testified that they were present when the broker obtained the agreement from the defendant, and both gave testimony from which it may be found that the broker received the agreement upon terms which gave him no right to deliver it to the plaintiff without further authority from the defendant. It is true that the acts of the defendant at the registry of deeds favor the inference that she did authorize the delivery of the agreement; but, on the other hand, the defendant's own testimony as to what she said there tends to show that she there claimed that the broker had acted wrongfully in delivering the agreement to the plaintiff.

The presiding justice had the witnesses before him, and we cannot say that he was wrong in dismissing the bill.

Decree affirmed.

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CHARLES A. GREGORY *vs.* MERCHANTS' NATIONAL BANK & another.

Suffolk. March 21, 1898. — May 18, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Deposit in Bank — Trust — Parties to Suit in Equity — Jurisdiction of the United States Circuit Court.

The direct legal liability of a bank for money deposited subject to withdrawal by check is only to the depositor.

If one seeks by a bill in equity to establish a trust in a deposit in a bank, and to set up a title adverse to the depositor, the depositor is a necessary party to the suit.

Where money is deposited by order of the Circuit Court of the United States in a bank, and is held by it subject to withdrawal only upon an order of one of the judges of that court, no proper inquiry can be made as to the ownership of the fund without making the judges of the court parties to the suit; and whether the order under which it was paid was properly or improperly made cannot be determined upon a proceeding to obtain the money in another court, the Circuit Court, by virtue of a suit in equity pending therein to determine the rights of the respective claimants, having exclusive jurisdiction of the subject matter and of the parties.

BILL IN EQUITY, against the Merchants' National Bank of Boston and John G. Stetson, to obtain from the bank a sum of money received on deposit. The defendant bank demurred thereto, assigning various grounds therefor. A decree was entered sustaining the demurrer and dismissing the bill; and the plaintiff appealed to this court. The facts appear in the opinion.

F. A. Brooks & A. S. Hall, for the plaintiff.

L. S. Dabney, for the defendant bank.

KNOWLTON, J. This is a bill in equity to obtain from the defendant bank a sum of money received on deposit, amounting to $18,820, which was the proceeds of a promissory note to which the plaintiff contends that he was entitled. The note was claimed by other parties. A suit at law upon it was pending in the Circuit Court of the United States for the First Circuit, and a suit in equity was pending in the same court to determine the rights of the respective claimants of it. There was also a submission to arbitration *in pais*, by the parties to the suit in equity, of the questions arising in that suit, and an award under the submission, the effect of which was in dispute.

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In this situation it was agreed by the claimants of the note that it should be delivered to John G. Stetson, Esquire, who was at that time the clerk of the Circuit Court of the United States for the First Circuit, to be retained by him subject to the joint order of the counsel of the respective claimants. Afterwards an order was entered by the court in said suit in equity, requiring Mr. Stetson to file the note in the action at law above referred to, and directing the maker of the note, the defendant in that action, upon and after the entry of the judgment therein, as follows: "To pay into the registry of this court the amount of said judgment, . . . and that said amount be held subject to the rights of the parties claiming said note, and to abide the decision of the court in this cause." Thereupon Mr. Stetson filed the note in court in accordance with the order, judgment was entered in the action at law upon the note for the sum of $18,879.96, and the defendant in the action paid into court that sum in satisfaction of the judgment. On the same day Mr. Stetson, the clerk of the court, took the money and deposited it with the Merchants' National Bank, and received from the bank a pass-book in the usual form, which showed that the money was deposited by the Circuit Court, it being designated as "No. 2,435, *Jones* v. *Swift*," which were the number and name of the action at law. All these facts are set out in the bill. A demurrer to the bill was sustained, and the case comes before us on an appeal from the decree dismissing the bill.

By the Revised Statutes of the United States, § 995, it is provided that "all moneys paid into any court of the United States, or received by the officers thereof in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer, an assistant treasurer, or a designated depositary of the United States in the name and to the credit of such court," etc. Section 996 is as follows: "No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn." Section 5504 imposes a heavy penalty upon every clerk or other officer of a court of the United States

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who fails forthwith to deposit any money belonging in the registry of the court with the treasurer, an assistant treasurer, or a designated depositary of the United States, in the name and to the credit of such court.

While the bill does not expressly state that the defendant bank is a designated depositary of the United States, and that the money was deposited by the clerk in accordance with his legal duty under the statute after the money had been paid into court, the averments of the bill warrant no other legal inference.

It is well settled that the direct legal liability of a bank for money deposited subject to withdrawal by check is only to the depositor. *Carr* v. *National Security Bank*, 107 Mass. 45. *Bank of the Republic* v. *Millard*, 10 Wall. 152. *State National Bank* v. *Dodge*, 124 U. S. 333. It is equally clear that, if one seeks by a bill in equity to establish a trust in a deposit in a bank, and to set up a title adverse to the depositor, the depositor is a necessary party to the suit. To a suit in equity which has for its object the disposal of any trust fund, all known claimants of the fund must be made parties. *Williams* v. *Bankhead*, 19 Wall. 563.

The money claimed in this case was deposited by the Circuit Court of the United States, and is held by the defendant bank, subject to withdrawal only upon an order of one of the judges of that court. It is quite clear that no proper inquiry could be made in regard to the ownership of the fund without making the judges of the court parties.

But the objection to the bill lies deeper than this. The money was paid into court under an order of court, and was held by the court *in custodia legis*. Whether the order under which it was paid was properly or improperly made cannot be determined upon a proceeding to obtain the money in another court. The Circuit Court, by virtue of the pending suit in equity, had jurisdiction of the subject matter and of the parties. No other court has jurisdiction of any question pertaining to the disposition of the money which is held by that court. Claims upon the money are to be made in that court, and to be heard and determined there. This was held in *Gregory* v. *Merchants' National Bank*, 76 Fed. Rep. 683, a suit brought to obtain this same money. Any other doctrine

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would be at variance with the right of control of its own business which inheres in every court of justice, and would cause uncertainty and confusion in the determination of legal rights. It is plain that this suit cannot be maintained, because the judges of the United States Court are not parties to it, and because this court has no jurisdiction to make them parties in a case of this kind, or to adjudicate upon questions which are properly cognizable only in that court. *Tuck* v. *Manning*, 150 Mass. 211. *Columbian Book Co.* v. *De Golyer*, 115 Mass. 67.

Whether the bill is fatally defective for want of other parties, on grounds intimated in *Gregory* v. *Stetson*, 133 U. S. 579, another suit to obtain possession of the proceeds of this note, it is unnecessary to determine. *Decree affirmed.*

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JAMES CONLEY & another *vs.* FRANK FINN.

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Suffolk. March 21, 1898. — May 18, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Specific Performance — Title to Real Estate — Acknowledgment, Recording, and Delivery of Deed — Adverse Possession.

Where, on a bill in equity for the specific performance of an agreement executed in 1897 for the sale and purchase of real estate, the defendant refused to complete the purchase for the reason that a deed in the chain of title in 1839 was not acknowledged and recorded until 1859, after the death of the grantee, it being agreed that the title of the grantee, if he had any, had passed by mesne conveyances to the plaintiff, the court said that, there being nothing to show that the deed was not delivered on the day of its date, and there being evidence to show a title by adverse possession, which was almost, if not quite, conclusive, there was no reasonable doubt that the title of the plaintiff was good, and that the defendant could take it without special risk of being put to expense to defend his rights against unknown claimants who might thereafter appear.

The date of a deed is *prima facie* evidence of its delivery at that date, even though it was not acknowledged until a later date.

BILL IN EQUITY, filed August 26, 1897, in the Superior Court, for the specific performance of an agreement for the sale and purchase of certain real estate. Hearing on the bill, answer, and an agreed statement of facts before *Lilley*, J., who, having ordered that a decree be entered dismissing the bill and the

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plaintiffs having appealed, at the request of the plaintiffs and with the consent of the defendant, reported the case for the determination of this court. If the ruling was correct, the decree was to be affirmed; otherwise, such decree was to be entered as justice might require. The facts appear in the opinion.

F. B. Patten & J. R. Nichols, for the plaintiffs.

D. C. Delano, for the defendant.

KNOWLTON, J. The defence is that the plaintiffs do not offer to give a good title. They tendered to the defendant a warranty deed of the premises, subject to a mortgage, which, by the terms of the contract, he was to assume and pay as a part of the consideration. It is agreed that this deed gives a perfect title to the property unless there is an encumbrance or a cloud upon the title growing out of the fact that a deed from Nathan Conant to George Footman, under which the title is claimed, and which bears date February 11, 1839, was not acknowledged until August 3, 1859, nor recorded until August 4 of the same year. George Footman, the grantee, died in March, 1859, leaving a will, which was duly proved and allowed. The house and land in question were included in the executor's inventory as a part of his estate. The title of George Footman, if he had any, has passed by mesne conveyances to the plaintiffs. Among these conveyances are two warranty deeds, one from Edwin Rice to Henry T. Wheeler, dated April 23, 1868, and recorded April 28, 1868, and one from John H. Wheeler and others, being all the heirs of Henry T. Wheeler, to the plaintiff, dated June 20, 1889, and recorded June 26, 1889. It is agreed that there is testimony from credible witnesses who were in a position to know the facts which tends strongly to show that from a time prior to 1872 Henry T. Wheeler, and after him his heirs, and after them the plaintiffs, occupied the premises under a claim of ownership, living in the house, and maintained a continuous and undisturbed possession from that time until the present, and that none of them ever heard of any claim by Nathan Conant or his heirs, or any person representing them. Albert H. Conant testified that he is a son of Nathan Conant, that his father resided in this Commonwealth from 1832 to 1876, and died a resident thereof; that neither said Nathan nor his heirs were ever of unsound mind, and that he never heard of any claim being made by Nathan

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Conant or his heirs to the premises. It is not suggested that there is any evidence to contradict any of this testimony. The question is whether the fact that the deed from Conant to Footman was not acknowledged or recorded until after the death of Footman makes the plaintiffs' title so doubtful and uncertain that the defendant ought not to be compelled to take the property and pay for it.

The general rule is, that, in order to maintain a suit for specific performance against a purchaser of real estate, the plaintiff must show that the title is good beyond a reasonable doubt. *Sturtevant* v. *Jaques*, 14 Allen, 523. *Hayes* v. *Harmony Grove Cemetery*, 108 Mass. 400. *Jeffries* v. *Jeffries*, 117 Mass. 184, 187. But the mere possibility or suspicion of a defect is not enough to relieve a purchaser from liability under his contract. *Hayes* v. *Harmony Grove Cemetery*, 108 Mass. 400. *Dow* v. *Whitney*, 147 Mass. 1. *Lowes* v. *Lush*, 14 Ves. 547. *Franklin* v. *Brownlow*, 14 Ves. 550. *Pyrke* v. *Waddingham*, 10 Hare, 1. In *First African Methodist Episcopal Society* v. *Brown*, 147 Mass. 296, 298, Mr. Justice Devens says of the doubt which will relieve a purchaser of real estate from his obligation specifically to perform his contract, that it "must be reasonable, and such as would cause a prudent man to pause and hesitate before investing his money. It would be seldom that a case could occur where some state of facts might not be imagined which, if it existed, would defeat a title. When questions as to the validity of a title are settled beyond reasonable doubt, although there may be still the possibility of a defect, such mere possibility will not exempt one from his liability to complete the purchase he has made. . . . It would be often practically impossible for a party to negative all objections which might be imagined, and which, if they existed, would defeat his title."

In the present case if the deed from Conant was not executed and delivered in the lifetime of the grantee, Footman, no title passed under it. But the fact that it was not acknowledged or recorded until after the grantee's death does not indicate that it was not delivered on the day of its date. At most it merely suggests a question in regard to it. The date of a deed is *prima facie* evidence of its delivery at that date, even though it was not acknowledged until a later day. *Smith* v. *Porter*, 10 Gray,

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66. *People* v. *Snyder*, 41 N. Y. 397. *Harman* v. *Oberdorfer*, 33 Gratt. 497. *Deininger* v. *McConnel*, 41 Ill. 227. *Ford* v. *Gregory*, 10 B. Mon. (Ky.) 175. Acknowledgment or equivalent proof is only required as a preliminary to recording. Pub. Sts. c. 120, §§ 5–9.

Although the presumption of delivery of a deed on the day of its date may be contradicted and controlled by evidence to the contrary, there is no such evidence in the present case. Moreover, if there was no title by deed, there is evidence to show a title by adverse possession, which is almost, if not quite, conclusive. We are not prepared to say that in no case would a purchaser be compelled in equity to take a title which rests on adverse possession. The case of *Noyes* v. *Johnson*, 139 Mass. 436, does not support the defendant's contention on this point, but was decided on the ground that the special provisions of the contract of sale implied that the purchaser was to have a good title by the record. It has been held both in England and in America that a title by adverse possession may be so clearly proved and be so free from doubt as to be a proper foundation for a decree for specific performance against the purchaser. *Scott* v. *Nixon*, 3 Dr. & War. 388. *Games* v. *Bonnor*, 54 L. J. (N. S.) Ch. 517. *Ottinger* v. *Strasburger*, 33 Hun, 466; *S. C.* 102 N. Y. 692. *Pratt* v. *Eby*, 67 Penn. St. 396, 402. *Gump* v. *Sibley*, 79 Md. 165. *Hedderly* v. *Johnson*, 42 Minn. 443, 445. *Logan* v. *Bull*, 78 Ky. 607.

Without going so far as the courts have gone in some of these cases, and considering the case in the aspect most favorable to the defendant, the evidence makes applicable a doctrine which was stated by Judge Folger in *Murray* v. *Harway*, 56 N. Y. 337, 343, as follows: "The courts of equity in this State have not held that a title, though the proof thereof rests in part in parol, is, for that reason, so doubtful and uncertain as that specific performance by the purchaser will not be decreed. And it has been held, that, where one of the paper links of title was defective, the lapse might be supplied by parol proof of possession, under color of title, sufficient to establish a good adverse possession; and that such a title is enough on which to found a decree." See also *O'Connor* v. *Huggins*, 113 N. Y. 511.

In view of all the evidence, we are of opinion that there is no

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reasonable doubt that the title of the present plaintiffs is good, and that the defendant can take it without special risk of being put to expense to defend his rights against unknown claimants who may appear hereafter. *Decree for the plaintiffs.*

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CALEB SAUNDERS & another, assignees, *vs.* HERBERT F. RUSSELL & others.

Suffolk. March 21, 1898. — May 18, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Insolvency — Promissory Note — Mortgage — Preference.

A., who was in an insolvent condition, on being pressed by a creditor, B., got C., who was in B.'s employ, to indorse, on giving C. security, his (A.'s) note to B. for the debt, and gave C. a mortgage of nearly all his property. C. knew that A. was insolvent, and that A.'s only motive for executing the mortgage, other than that of delaying creditors, which also was avowed by A., was to give further security to B., without receiving any new consideration from him. *Held*, on a bill in equity by the assignees in insolvency of A., brought three months and a half after the date of the mortgage and two months after A. was petitioned into insolvency, that the mortgage was a preference, and that it made no difference that the attempt was in the manner described instead of the more direct one of a mortgage to B.

BILL IN EQUITY, filed June 18, 1897, by the assignees in insolvency of Edward Courtemanche, to set aside a mortgage of personal property made by him to the defendant Russell, to secure him as accommodation indorser upon a note given by Courtemanche to the other defendants, George Hyde and Amasa E. Southworth, copartners under the name of Hyde and Southworth, in payment of Courtemanche's indebtedness to them, and to restrain Russell from prosecuting an action at law against the plaintiffs for the conversion of all the personal property included in the mortgage.

In the Superior Court a decree was entered declaring the mortgage void and of no effect, and that the defendant Russell be perpetually enjoined from prosecuting the action at law or any action at law against the plaintiffs for the same cause, and

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that a cross-bill filed by him praying that the assignees deliver the property to the plaintiff Russell, or, if they had sold the same, to pay the mortgage debt, be dismissed with costs; and that the plaintiffs be allowed their costs on their bill in equity. The defendants appealed to this court. The facts appear in the opinion.

V. J. Loring, for the defendants.

E. B. Hale, for the plaintiffs.

HOLMES, J. This is a bill in equity, brought by the assignees in insolvency of one Courtemanche, to set aside a mortgage as a preference. The case was tried in the Superior Court, and a decree was made for the plaintiffs. It now is here by appeal on the evidence. It presents only questions of fact.

The petition in insolvency was filed on April 16, 1897. The date of the mortgage is March 1, 1897. At that time the mortgagor plainly was insolvent, and knew it. Hyde and Southworth, among other creditors, were pressing him, having stopped giving him credit about January 16. They do not admit knowledge of Courtemanche's condition, but their actions and indeed the admissions that come out in their testimony show very plainly that they knew it. They cannot have failed to know it. They were a large and intelligent business house, and Courtemanche's financial reputation was bad. *Lee* v. *Kilburn*, 3 Gray, 594. They wanted security, and did not want to take a mortgage, because they did not think it prudent to do so. They suggested that Courtemanche should find an indorser. This he could not do, until in some way it occurred to him that he might get Hyde and Southworth's right hand man, who had charge of collecting their bills, one Russell, to indorse for him, on giving him security for his indorsement. This plan was put into execution. Courtemanche gave Russell a mortgage of all his property, with exceptions not worth mentioning, and Russell indorsed a six months' note to Hyde and Southworth for Courtemanche's debt. Courtemanche received no other consideration, and his conveyance properly would be found not to have been made in the usual course of business. *Peabody* v. *Knapp*, 153 Mass. 242.

According to the testimony, the mortgage was executed before Hyde and Southworth were told about it, Russell was paid

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as well as secured for his indorsement, and the liability assumed by him to the partners was a real liability, and the only object of the transaction so far as they were concerned. But it does not need argument to show that if this mortgage had been given to Hyde and Southworth directly, it would have been a flagrant preference, and it needs very little to show that the above arrangement might be found, and, as we think, ought to be found, to be a mere device to reach the same end by more roundabout means. The examination of the defendants shows that their testimony cannot be accepted without reservation where their interest is concerned. We are compelled to reject their protestations of ignorance and innocence as not to be believed. When Russell testifies that he knew that the arrangement would be acceptable, we infer either that the firm had made use of this device before, or had authorized it in this particular case. It is hard to believe that Russell should have come in to the scheme, and should have accepted a *bona fide* liability in exchange for a mortgage of property which he had not examined at the time, and which probably was not enough to secure him. On the other hand, the nature of Russell's relation to his employers, their demand for security, and their cautious unwillingness to accept a mortgage directly to themselves, make it most likely that what was done had the same end in view. But the whole matter may be put more shortly. Russell, the mortgagee, knew that Courtemanche was insolvent. He knew that the only motive Courtemanche had for executing the mortgage, other than that of delaying creditors, which also is avowed by Courtemanche, was to give further security to Hyde and Southworth without receiving any new consideration from them. He knew, in other words, that the intent was to prefer them. It can make no possible difference that the attempt was made in the manner described instead of the more direct one of a mortgage to the firm. Pub. Sts. c. 157, § 96. *Whipple* v. *Bond*, 164 Mass. 182.

Decree for the plaintiffs.

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NATHANIEL P. HAMLEN & another, trustees, *vs.* BENJAMIN F. KEITH.

Suffolk. March 22, 1898. — May 18, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Equity — Deed — Condition — Implication — Parol Contract — Dedication — Prescription.

At the trial of a bill in equity, filed May 8, 1897, to enjoin the defendant from building out upon his land beyond the former front of his building on T. Street in Boston about four feet beyond the old line, which was also the line of the other buildings between W. and M. Streets which intersect T. Street, one to the north and the other to the south of the place in question, it appeared that the plaintiff owned the building adjoining the defendant on the M. Street side; that on May 25, 1795, the town voted to sell all or any part of land opposite the Common on what are now T. Street and P. Street, and including the land between W. and M. Streets, "upon express condition that all buildings to be erected on the lands sold by virtue of this vote shall be regular and uniform, and of brick or stone, and covered with slate or tile, or some materials that will resist fire"; that on January 12, 1796, four large lots, including one called lot five, of which the defendant's land is a part, and one called lot six, of which the plaintiff's land is a part, were conveyed under this vote to a person in one deed, in which the condition was repeated in the above words; that the present parties derived their titles through mesne conveyances from this deed; that by 1810, or a little later, there was a continuous line of buildings from W. Street to M. Street, upon a straight line at a slight angle to T. Street, but at an average distance from it of about four feet; and that in and after July, 1877, the house on the defendant's land was altered from a dwelling-house to a shop, the four feet in question being taken into the basement story and covered, at a level with the adjoining sidewalk, with Hyatt lights, made of iron and glass, and adapted at once to light the basement and to serve as a pavement for travel. *Held*, that the plaintiff was not entitled to an injunction; that there was no dedication of the four feet as a footway, and that there was no way by prescription.

BILL IN EQUITY, by the owners of the buildings 164 and 169 Tremont Street, Boston, to enjoin the defendant, as owner of 163 Tremont Street, from building out the front of his building over the space about four feet wide between the front wall of his building and the line of the sidewalk, and in front of the line of the front walls of the plaintiffs' building and other buildings in the block, on the ground of a condition in a vote and deed of the town of Boston in 1795 and 1796, and of a public right of way, by dedication or prescription, over said space.

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West Street and Mason Street intersect Tremont Street, one to the north and the other to the south of the place in question.

Hearing before *Allen*, J., who ordered the bill dismissed, with costs, and, at the request of the plaintiffs and with the consent of the defendant, reported the case for the consideration of the full court. The facts appear in the opinion.

H. W. Putnam, for the plaintiffs.

W. E. Jewell, for the defendant.

HOLMES, J. This is a bill in equity, brought to enjoin the defendant from building out upon his land beyond the former front of his building on Tremont Street in Boston. To suit the defendant's convenience no preliminary injunction was asked, it being agreed that the defendant would proceed at his peril, and the building now has been erected. It projects about four feet beyond the old line, which is also the line of the other buildings between West and Mason Streets. The plaintiffs own the building adjoining the defendant on the Mason Street side, and rely upon a condition in a vote and deed of the town of Boston, and also upon the existence of a public way by dedication or prescription.

On May 25, 1795, the town voted to sell all or any parts of a large amount of land opposite the Common on what are now Tremont Street and Park Street, and including the land between West and Mason Street, "upon express condition that all buildings to be erected on the lands sold by virtue of this vote shall be regular and uniform, and of brick or stone, and covered with slate or tile, or some materials that will resist fire." On January 12, 1796, four large lots, including one called lot five, of which the defendant's land is a part, and one called lot six, of which the plaintiffs' land is a part, were conveyed under this vote to one Henry Jackson by one deed, in which the condition was repeated in the above words. The present parties derive their titles through mesne conveyances from this deed, and this is the restriction upon which the plaintiffs rely. By 1810, or a little later, there was a continuous line of buildings from West Street to Mason Street, upon a straight line at a slight angle to Tremont Street, but at an average distance from it of about four feet.

We are of opinion that the plaintiffs have no right to an injunction under the foregoing deed. It is true that the absence of

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equity jurisdiction at the time when an instrument is made is not conclusive against the granting of equitable remedies at a later time, (*Rogers* v. *Ward*, 8 Allen, 387, 390,) but the state of the law at the date of the deed may be taken into consideration, and cautiously used in determining the meaning and operation of its words. *Crocker* v. *Cotting*, 166 Mass. 183, 187. *Staigg* v. *Atkinson*, 144 Mass. 564, 569. At the time when the city of Boston conveyed to Jackson, no one, it is safe to say, dreamed that the words quoted could operate except as a condition, or be enforced by any one except the town of Boston. No one dreamed that they gave rights to any one except the town. If nevertheless equity subsequently should treat such ancient restrictions as standing on the same footing as later ones with regard to enforcement, at least it would be bound in the matter of construction to interpret the words as they would have been interpreted when written. We must take the words as if their only effect was to create a condition when we are finding out their meaning, even if we should persuade ourselves that they had a latent operation by way of trust in favor of the several landowners affected, irrespective of any one's intent or knowledge at the time.

Taking the words as a condition which meant forfeiture for breach, we naturally are not disposed to take them as meaning any more than they say in terms, and we should give the grantees the benefit in case of doubt. We do not read the condition as intended to bind the land for all time to a building line inside the boundaries of the conveyance. It says nothing about such a line; if one were mentioned the case would be very different. The words "regular and uniform" cannot be taken to refer to the line of fronts without something of a strain, for if they do refer to it, they provide no standard of regularity and uniformity, so that it would seem that the first builder would set the rule for the rest. The vote deals with a large amount of land not all alike in circumstances, and the condition in terms refers to buildings, not to land. We are of opinion that the words are given sufficient force if they are confined at most, so far as the present question is concerned, to the original construction of the buildings first erected, — those which it was expected would be erected and which were erected in fact soon after the town had made its sales. It seems to us that it would be going too

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far to interpret the words as binding the owner of every lot into which the land might be cut up to adhere for all time, and under whatever change of conditions and circumstances, to a building line other than that of the conveyances, determined by the accident of what the first builder chose to do.

But, further, we have not been able to persuade ourselves that the condition confers any rights upon the plaintiffs, whatever its construction. The general difficulty which we have stated is made insuperable to our minds by the specific purposes shown on the face of the condition itself. The town evidently was considering only appearance and safety from fire, and both only in the public interest. We do not think that the plaintiffs can claim under it, as granted by implication, rights which it is practically certain never were intended to be conferred. The repetition of the condition in the later deeds did not purport to enlarge the obligations or rights originally created, whatever those obligations or rights might turn out to be.

It is argued that the uniformity of the line of buildings warrants the finding of a parol contract which may be enforced. The judge who tried the case found the other way. The condition in the deeds sufficiently explains how the line of fronts came to be uniform, and it would be extravagant to say that uniformity between adjoining houses unexplained and by itself warrants a finding that it was due to an agreement binding the land that the line of building should be the same forevermore.

Between July 16 and October 22, 1877, the house on the defendant's land was altered from a dwelling-house to a shop. The four feet in question were taken into the basement story, and were covered, at a level with the adjoining sidewalk, with Hyatt lights, made of iron and glass, and adapted at once to light the basement and to serve as a pavement for travel. For some years, it may be assumed, the public walked over the space more or less. It is argued that this was a dedication of the four feet as a footway. We rather should have supposed it imported a license than anything more. But if a dedication was attempted, it cannot be taken to have been a dedication otherwise than as a part of the street of which it formed a part to the eye, — in other words, as a highway, not as a footway. The only reason why it even was argued to have been otherwise is because dedi-

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cation of land for a highway without the consent of the town then was and still is impossible. Gen. Sts. c. 43, § 82. Pub. Sts. c. 49, § 94.

It also is argued that there is a way by prescription. It clearly appears that there was no such way when the bill was filed. It would seem that there had been no continuous adverse use for nearly the necessary time when the bill was filed. If there had been such continuous use it probably was interrupted, and certainly does not appear not to have been, by the erection of the defendant's new building. Finally, if there had been a public way of any kind, either by dedication or by prescription, it is at least doubtful whether that fact would have furnished a ground for the plaintiffs' bill. *Harvard College* v. *Stearns*, 15 Gray, 1. *Stanwood* v. *Malden*, 157 Mass. 17, 18. *Shaw* v. *Boston & Albany Railroad*, 159 Mass. 597. *Bill dismissed.*

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GEORGE S. MERRILL *vs.* COMMONWEALTH MUTUAL FIRE INSURANCE COMPANY. WILLIAM B. STEVENS, receiver, petitioner.

Suffolk. March 23, 1898. — May 18, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Mutual Fire Insurance Company — Insolvency — Receiver — Time at which Rights are fixed.

The rights of all parties to share in the assets of an insolvent mutual fire insurance company are fixed as of the date of the filing of the bill in equity enjoining it from further proceeding with its business.

PETITION IN EQUITY, filed December 15, 1897, by the receiver of the Commonwealth Mutual Fire Insurance Company, for instructions as to the allowance and payment of certain claims.

The petition alleged that on March 19, 1895, an injunction was issued enjoining the company from proceeding with its business till further order of the court; that on March 26 the injunction was modified so that the corporation and its officers

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might collect all moneys, cancel its policies without payment of return premiums, and make upon its members and collect from them an assessment as provided by law; that on May 28, 1895, the petitioner was appointed receiver, and the injunction was modified so that the corporation and its officers should have no further authority to collect moneys, cancel its policies without payment of return premiums, and make upon its members and collect from them an assessment as provided by law, and the injunction, so far modified, was made absolute and perpetual; that subsequently to said March 19 certain losses by fire occurred on property insured on policies theretofore issued by the company, proofs of which had been filed but had not been allowed, among the parties being Washington G. Benedict, and Finlay and Macaulay; that an assessment was laid by the officers of the company before the injunction was issued, and notice thereof was sent by mail to the policy holders liable to the assessment, demanding payment thereof, and notifying them that, unless the assessment was paid within fifteen days after notice, all liability of the company for loss would cease, such a vote having been passed by the directors of the company on January 28, 1895, and that among those so notified were Finlay and Macaulay, who failed to pay the assessment within fifteen days after notice thereof, and have never paid it.

At the hearing before *Holmes*, J., appeared Benedict, Finlay and Macaulay, and the National Wall Paper Company, represented by counsel, and claimed the right to be allowed to prove their claims and to share in the assets of the defendant corporation under some appropriate order of the court. Benedict and Finlay and Macaulay had previously appeared before the auditor to whom was referred the question of the amount of the proposed assessment, and had prayed that their claims might be included therein. In accordance with the recommendation of the auditor, an assessment of $250,000 was afterwards levied under an order of this court dated March 5, 1896, in respect of losses existing before the petition was filed. The funds in the receiver's hands were raised by this assessment. The parties mentioned in the petition paid their shares of the assessment, except as therein set forth. The judge ruled that no losses incurred after the filing of the bill were entitled to share in the

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dividend, and ordered a decree to that effect upon the petition. The parties represented by counsel excepted, and, at their request, the judge reported the case for the consideration of the full court, such decree to be entered as equity might require.

W. B. Stevens, receiver, *pro se*.

P. A. Collins & A. M. Lyman, for certain claimants.

ALLEN, J. The question presented by the claimants can hardly be considered as open in this Commonwealth. The bill was filed March 19, 1895, and on the same day an injunction was issued, which was made perpetual, May 28, 1895, and a receiver was then appointed. The bill was filed by the insurance commissioner, acting under St. 1894, c. 522, § 7. It has been held heretofore, in *Stevens* v. *Shenango Glass Co.* 166 Mass. 238, that a creditor should be enjoined from enforcing an attachment made against this company after the filing of the bill, the reasons assigned being that "the rights of all parties to share in the property of the corporation are fixed as of the date of the filing of the bill in equity," and that the rights of the receiver to the possession of the property "for the purposes of distribution relate back to the commencement of the proceedings." It is sought to distinguish the present case from that, on the ground that there the creditor sought to gain a preference to himself by the attachments, while here the claimants only seek to be allowed to share with the creditors generally. It has, however, been held heretofore that the rights of creditors are fixed as of the date of the proceedings, or, as was said in *Atlas Bank* v. *Nahant Bank*, 23 Pick. 480, 489, at least by the issuing of an injunction. *Burdon* v. *Massachusetts Safety Fund Association*, 147 Mass. 360, 368. *Fogg* v. *United Order of the Golden Lion*, 159 Mass. 9, 12. *Garham* v. *Mutual Aid Society*, 161 Mass. 357, 365, 367. *Williams* v. *Union Reserve Fund Association*, 166 Mass. 450. The case of *Jones* v. *Arena Publishing Co.*, *ante*, 22, rests on special grounds. This rule must be considered as established in this Commonwealth.

Decree affirmed.

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GEORGE WHITE, executor, *vs.* MASSACHUSETTS INSTITUTE OF TECHNOLOGY & others.

Suffolk. March 23, 24, 1898. — May 18, 1898.

Present: ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Will — Codicil — Revocation — "Donors" construed to mean "Donees" — Power of Appointment — Deficiency of Assets — Abatement of Legacies — Interest upon Legacies — Executor as Trustee — Life Estate in Furniture, etc. — Instructions to Trustee — Gifts to Faithful Servants — Cousins — Meaning of Legacy.

The gift of personal effects, etc. by will is revoked by a gift in the codicil of "the remainder of articles, not previously disposed of," these words, as there used and in other portions of the codicil, pointing to a disposition executed by the testator in his lifetime; and articles not so given away are "the remainder of articles, not previously disposed of."

A gift by will of "all the rest, residue, and remainder of my estate, real and personal," is revoked by a codicil disposing of all the testator's personal estate, the testator leaving no real estate.

A testatrix, by the fifth section of her will, gave, after the death of her husband, who died first, eighty thousand dollars, "which my father in his will gave me power to dispose of" to certain legatees. By the second section of her first codicil she gave "all estate, real and personal, which I have a right to dispose of by my father's will, or which belongs to me in my own right, which I have not disposed of by my said will," to certain legatees, and stated her intention to dispose of all estate she had a right to dispose of, "whether by the will of my father or which may belong to me." The testatrix left no real estate, and by a second codicil disposed of all her personal estate, except the eighty thousand dollars named in the fifth section of the will. *Held*, that the second section of the first codicil was revoked *pro tanto* by the second codicil.

The word "donors," in a gift by will of personal articles "to the respective persons as donors thereof as presents from me," must be regarded as used by mistake for "donees."

The father of the testator left eighty thousand dollars in trust, the income to be paid to the testator for life, and gave him a power of disposition over the corpus of the fund by will. The testator, after directing by the fourth clause of his will that, if his own residue was not sufficient, this fund should be used to make good any deficiencies in his mother's charitable legacies, by the fifth clause of his will appointed a fund, "or so much thereof as may remain after the foregoing provisions of my will shall have been satisfied, in equal shares to" an Institute and a Museum, "two institutions established in Boston," etc. There were no deficiencies to be made good under the fourth clause, the appointment was not modified by the codicils, and the second codicil stated that it was not intended to dispose of any property over which the testator had a power of appointment. *Held*, that the whole fund was well appointed to the two institutions; that if the estate of the testator was insufficient to pay the legacies given in the second codicil, the fund

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in question was not to abate proportionately, and that if any interest had accrued since the death of the testator it should follow the fund.

In the case of money, if no trustee is specially named or appointed, the executor is to hold the money in trust and pay the interest only to the person entitled for life.

By article 3 of his codicil a testator gave a table and a chromolithograph absolutely to A. "if living at my decease," and the gift to her daughter M. and other daughters successively was only in case A. was not living at the death of the testator. By article 4 there was a gift over after the decease of A. and her four daughters. By article 5 there was a gift of a clock to A., and at her decease it was to be disposed of in the same way as the table and chromolithograph were given by article 3, and after the decease of A. and her four daughters it was given to two persons successively. By article 6 the testator gave to A., "if living at my decease," various articles. *Held*, that A., who died after the testator, took only a life interest in the table and chromolithograph; that her daughters were to take successive life interests at her death, the articles to be first handed to M., that being the rule as to chattels of this sort; that the clock was to be disposed of in the same way; and that the things named in article 6 were given to A. absolutely, and were to be delivered to her representatives.

Where articles are given by will to K., and one of them, on her decease, "may be first given to" E., and at her decease to M. and the others, if K. be not living at her decease "shall be given to the eldest daughter of" E., and at the decease of the latter to M., the articles are to be delivered by the executor to K.

This court will not answer a request of a trustee for instructions as to his duties in the future.

The question as to the gift by will of a hundred dollars a year, "should there be one or more persons at my decease but now not known in my employ who may have faithfully served me at home," is answered by the finding that the only persons answering the description are A. and B. The sum will be paid to each of them.

The words in a codicil, "to each of my cousins in the first degree who is not remembered by a legacy from me in my will and codicils — to each of such cousins I give the sum of twenty-five hundred dollars," do not describe first cousins already deceased when the words were used, or the issue of such cousins, and therefore such issue cannot take, whether the testator knew of the death of their ancestor or not, and, in the absence of devise to their ancestor, they are not helped by Pub. Sts. c. 127, § 23; and "legacy" must be held to be "pecuniary legacy," so that cousins to whom bequests of articles of furniture or ornament were made are not "remembered by a legacy" within the meaning of the provision.

BILL IN EQUITY, by the executor of the will of Ann White Dickinson, to obtain the instructions of the court as to the construction thereof and two codicils thereto.

The bill alleged that the testatrix died on or about April 11, 1896, leaving a will and two codicils thereto, which were proved and allowed in the Probate Court for the county of Suffolk on July 23, 1896.

The third section of said will is as follows: "I give all my per-

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sonal effects, consisting of my furniture, household utensils, linen and clothing, all my silver and china ware, all my personal ornaments, pictures, paintings, horses, carriages, harnesses, and stable stuff to the executors of my will, or whoever may execute the same, to be given by them to my friends as they shall see fit, but in their disposal of said things I trust they will be governed somewhat by a memorandum of my wishes in such respect which I shall leave with this will."

The fifth section of said will is as follows: "I direct the executors of my will to transfer and pay over, after the death of my husband, the said eighty thousand dollars, which my father in his will gave me power to dispose of, or so much thereof as may remain after the foregoing provisions of my will shall have been satisfied, in equal shares, to the Massachusetts Institute of Technology and the Museum of Fine Arts, two institutions established in Boston, to be held in trust by said institutions, on like terms and conditions, in all respects, as the legacies given to said institutions by my mother, the late Ann White Vose, by her will."

The will was executed on December 23, 1876.

The husband of Ann White Dickinson died before her. It will not be necessary to appropriate any of said fund of eighty thousand dollars to any of the "foregoing provisions" of her will, above referred to.

The sixth section of said will is as follows: "All the rest, residue, and remainder of my estate, real and personal, of which I shall die seised and possessed, or to which I shall be entitled, at my death, whether as devisee, legatee, heir at law, or next of kin of my father, or however otherwise entitled, I give, bequeath, and devise to the trustees of the residuary estate of my mother, the late Ann White Vose, under her will, in trust, nevertheless, to hold, manage, and dispose of in like manner, as if it were a part of her residuary estate."

The second section of the first codicil to said will is as follows: "All estate, real and personal, which I have a right to dispose of by my father's will, or which belongs to me in my own right, which I have not disposed of by my said will, I give and devise to the twenty-two legatees, designated as legatees or donees by my mother, Ann White Vose, in her will, in that part thereof

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wherein she executed the power given to her in her husband's will (the late Josiah Vose) beginning with the Massachusetts General Hospital and ending with and including the twenty-second, 'the Home for Aged Women,' not in equal shares, but proportionately to said legatees thus given or designated by my mother. I make this provision for the reason that the residuary section or provision of my will may fail to have effect for some legal reason or cause, and it being my intention by this clause to make a disposition of all estate which I have a right to dispose of, whether by the will of my father or which may belong to me."

Said codicil was executed on September 16, 1884.

Another codicil, entitled "Memorandum," was executed on June 10, 1895.

The preamble of said last named codicil is as follows: "I, Ann White Dickinson, wife of George Dickinson, deceased, of Boston, county of Suffolk, do hereby give the remainder of articles, not previously disposed of, and declare that it is my will, or whoever may execute the same, shall deliver the articles of money, furniture, paintings, wearing apparel, personal articles, plate, carriages, horses, harnesses, and all other articles of a like nature hereinafter mentioned, to the respective persons as donors thereof as presents from me."

The third section of the codicil is as follows: "To my cousin, Abby W. Hale, I give the sum of five thousand dollars, and at her decease the amount shall be given equally to her two unmarried daughters, Mary and Katy, and at the decease of one of said daughters the full amount shall be given to the surviving sister; at her decease, the sum given in the first of this clause to my cousin Abby W. Hale shall be divided into two parts and given to the two married daughters, Fanny, Mrs. Baldwin, and Agnes, Mrs. Glidden, and further, if living at my decease, I also give from my father's personal articles the old Vose mahogany table, until their decease, in the possession of my father's parents: also the chromo of Lilacs, the former table and the frame of the latter having been purchased by my father for his parents many long years ago, but should my said cousin Abby not be living at my decease, I direct that the two above named articles shall be first given to my said cousin Abby's eldest unmarried daughter

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Mary, at her decease to the next unmarried daughter Katy, and afterwards to the third married daughter Fanny, Mrs. Baldwin, and last of all to the youngest married daughter Agnes, Mrs. Glidden, my wish being that every article formerly belonging to my father shall be cared for and perpetually by one of the members of the 'Vose' family."

The fourth section of the codicil is as follows: "After the decease of my said cousin Abby and her four daughters, I direct that the said old mahogany Vose table, as also the chromo of Lilacs, shall be given to my cousin Isabella Vose."

The fifth section of the codicil is as follows: "I direct that the very old high Vose clock, originally owned by my father and purchased by him for his parents, during their natural lives, shall be first given to my cousin Abby W. Hale, and at her decease the said clock shall be disposed of according to directions concerning the old Vose mahogany table and chromo of Lilacs, in clause third of this writing, and after the decease of my said cousin Abby and her four daughters it shall be given to my cousin Isabella Vose first, and at her decease to Mrs. Daniel B. Stedman of Chicago, my cousin, my wish being that every article belonging to my father shall be perpetually cared for [by] one of the Vose family."

The sixth section of the codicil is as follows: "If living at my decease, I give to my cousin Abby W. Hale a part of my parents articles, and a part of my own, as follows. [Here follows a long list.] But should my said cousin Abby not be living at my decease, all of the above mentioned articles in this clause may be added and disposed of in like manner as all other articles specified in clause third of this writing."

The eighth section of the codicil is as follows: "The following articles hereinafter mentioned of my parents, I give to my cousin Harriet W. Kennedy, if living at my decease, namely: a very old rather small white porcelain cologne stand, mounted with gilt, also flowers painted on the four sides of the bottle, . . . and concerning the white cologne stand, at the decease of my said cousin Harriet it may be first given to my cousin's eldest daughter Edith, at her decease to Mildred, second daughter of my cousin."

The ninth section of the codicil is as follows: "To my cousin

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Harriet W. Kennedy, I give one of my own convex mirrors, now placed above the front parlor mantle piece, but if not living at my decease, it shall be given to the eldest daughter of my said cousin Edith, at the decease of the latter it shall be given to the second remaining daughter Mildred. I also give to my cousin Harriet my choice small light blue French porcelain placque hoping at some time it may be ornamented with a rich crimson plush panel and suitably wide gilt frame, and still further, in addition to the above, I give her my large oil painting of 'Aurora,' and subject to the same final disposition as the above named articles in this clause."

The eleventh section of the codicil is as follows: "To my cousin Abby W. Turner, if living at my decease, I give the two coat of arms once owned by Grandmother White, but if not living at my decease they shall be first given to her oldest niece, Alice W. Turner, and at her decease they shall be given to the younger and married sister of the said Alice, namely, Josephine Crawford."

The twenty-second section of the codicil is as follows: "To my friend Mrs. Joshua Lincoln, if living at my decease, I give five thousand dollars, but if not living the said money shall be given to her two sisters, Emily and Susan Macomber, also at the decease of the said Mrs. Lincoln, the above mentioned sum of money shall be paid over to the two or one surviving sisters. I also give to my first named friend in this clause my medium sized oil painting Reading the Love Letter, with additional fifteen dollars towards regilding and varnishing, a set of very dark crêpe cloth curtains, with bedspread to match, at her decease the final disposition to be made in like manner as the sum of five thousand dollars above specified in this clause."

The twenty-third section of the codicil is as follows: "To my friend Miss Emily Macomber I give five thousand dollars, if living at my decease, but if not, the same sum of money shall be given to her sister Susan mentioned in the following clause, my wish being that the sum of ten thousand dollars shall remain undisturbed until after the decease of both sisters, Emily and Susan."

The twenty-fourth section of the codicil is as follows: "To my friend, Miss Susan Macomber, I give five thousand dollars,

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but if not living at my decease the said sum of money above donated shall be given to her sister Emily mentioned in the preceding clause, my wish being that the sum of ten thousand dollars shall remain undisturbed until after the decease of both sisters Emily and Susan, the income only being paid."

The thirty-first section of the codicil is as follows: "Should there be one or more persons at my decease but now not known in my employ who may have faithfully served me at home, I give to each and all the sum of one hundred dollars a year, the same amount being paid yearly to any one or more persons living with me at my decease, said yearly gift commencing when they shall have commenced work for me and not continuing over ten years, and farther should I from accident or ill health be incapacitated for every care and effort, I give my executors or whoever may have charge of this writing full power to act according to their best judgment and merits of the case."

The persons serving the testatrix at her home at her decease were Martha Lala Collins, cook, Sarah Ellen O'Brien, housekeeper, and Nancy Elizabeth Brigham, seamstress, who faithfully served her.

The thirty-fifth section of the codicil is as follows: "To an old time friend both of my parents and myself, Mr. Charles H. Hall, if living at my decease, I give five thousand dollars, and at his decease the above said amount shall be paid over to his wife, if living, but if not, the said sum shall be paid to his only daughter Susie."

In a section of the codicil, near the end thereof, appears the following:

"To each of my cousins in the first degree who is not remembered by a legacy from me in my will and codicils — to each of such cousins I give the sum of twenty-five hundred dollars.

"Notwithstanding anything in this codicil stated, I intend only to dispose by this codicil of such property as stands in my individual name and belongs to me outright, and I do not intend by this codicil to dispose of any property over which I have a power of disposal or appointment, either under the will of my father or under the will of my mother."

Other passages, an allusion to which is necessary for the statement of the case, are article fourth of the will: "I direct the

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executors . . . to make good from my residuary estate the deficiencies, if any, in the legacies given by my mother . . . to charitable institutions, and should my said residuary estate prove insufficient for that purpose . . . to appropriate to that end the said eighty thousand dollars, or so much thereof as may be necessary, but not, however, until the death of my husband"; article 48 of the second codicil, beginning, "Having disposed of many articles treasured in life, and in the event of not disposing of the few others"; article 1, giving a small box "if not previously disposed of"; and article 2, ordering the photographs of her father, mother, and husband to be destroyed "if not previously disposed of."

The father of the testatrix left eighty thousand dollars, to be deposited in the Hospital Life Insurance Company in trust to pay the income to the testatrix for life, and gave her a power of disposition over the corpus of the fund by will. The testatrix, after directing by the fourth clause of her will that if her own residue was not sufficient this fund should be used to make good any deficiencies in the charitable legacies given by the will of her mother, appointed the fund in the fifth clause of the will above given. The will contains the following: "I make no bequest to my relations because my mother in her will made liberal provision for them."

The plaintiff prays for the direction of this court as follows:

"1. Is the third section in said will revoked by the disposition of the testatrix's personal effects, made by her in the memorandum or codicil dated June 10, 1895?

"2. Is the sum of eighty thousand dollars, named in the fifth section of said will, a demonstrative legacy of that sum to the Massachusetts Institute of Technology and the Museum of Fine Arts, to be held by them as provided in the will of Ann White Vose, or shall said sum be reduced *pro rata* with other legacies given by the testatrix in the memorandum or codicil dated June 10, 1895, in case the estate of the testatrix shall be insufficient to pay said legacies in full? And what interest shall be paid the legatees?

"3. Is the sixth section in said will revoked by the memorandum or codicil dated June 10, 1895?

"4. Is the second section of the first codicil to said will re-

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voked by the memorandum or codicil dated June 10, 1895, said testatrix having left no real estate, and said memorandum or codicil of June 10, 1895, having made disposition of all the personal estate of the testatrix, excepting the sum of eighty thousand dollars named in the fifth section of said will? Or is it such a disposition of her whole estate as to defeat the entire memorandum or codicil of June 10, 1895?

"5. Is there any 'remainder of articles not previously disposed of' left to be distributed as directed in the preamble to the memorandum or codicil of June 10, 1895?

"6. Does the word 'donors' in said preamble refer to the executors or executor of said will? and if not, how is said word 'donors' to be construed?

"7. Is the sum of five thousand dollars, given to Abby W. Hale in the third section of said memorandum or codicil of June 10, 1895, and at her decease to be given to her two unmarried daughters, and at the decease of the senior of them to be given to the two married daughters of said Abby W. Hale, a trust fund to be held by the executor until the decease of said two unmarried daughters, or must said sum be paid over to them, the said Mary and Katy Hale? Abby W. Hale has deceased since the decease of the testatrix.

"8. To whom shall the 'old mahogany Vose table' be given by the executor? Also the chromo of Lilacs, both mentioned in the third section, and said table being mentioned in the fourth section of said memorandum or codicil of June 10, 1895?

"9. To whom shall the Vose clock, mentioned in section fifth of said memorandum or codicil of June 10, 1895, be given by the executor?

"10. To whom shall the various articles mentioned in the sixth section of said memorandum or codicil of June 10, 1895, be given by the executor?

"11. To whom shall the cologne stand mentioned in the eighth section of said memorandum or codicil of June 10, 1895, be given by the executor?

"12. To whom shall the various articles mentioned in the ninth section of the memorandum or codicil of June 10, 1895, be given by the executor?

"13. Is the sum of five thousand dollars, given in the twenty-

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second section of said memorandum or codicil of June 10, 1895, to Mrs. Joshua Lincoln, if living at decease of testatrix, but if not living to be given to her two sisters, Emily and Susan Macomber, and at the death of the said Mrs. Lincoln to be paid over to the two or one surviving sister, a trust fund? and if so, how shall the same be held, and to whom paid over?

"14. Is the sum of five thousand dollars, mentioned in section twenty-third of said memorandum or codicil of June 10, 1895, a trust fund? and if so, how shall the same be held, and to whom paid over?

"15. Is the sum of five thousand dollars, mentioned in section twenty-fourth of said memorandum or codicil of June 10, 1895, a trust fund? and if so, how shall the same be held, and to whom paid over? Are the two sums of five thousand dollars each, mentioned in said memorandum or codicil in sections twenty-third and twenty-fourth thereof, amounting to ten thousand dollars in the aggregate, to constitute a trust fund, the income of which is to be paid to Emily Macomber and Susan Macomber and the survivor of them? And upon the death of the survivor of them, does said sum of ten thousand dollars become a part of the residuary estate of the testatrix, or shall it be paid to the heirs of said Emily Macomber and Susan Macomber?

"16. Is the annuity of one hundred dollars per year, mentioned in section thirty-first of said memorandum or codicil of June 10, 1895, to be paid to any person or class of persons other than those actually in the employ of the testatrix at the time of her decease? If so, does the said section give the executor discretion as to whom said annuity shall be paid, and for how long a term to be paid, and what sums to each, and, in case of the death of any of such persons, must anything be paid to the heirs at law or devisees of said person?

"17. Is the sum of five thousand dollars, given in the thirty-fifth section of said memorandum or codicil to Charles H. Hall, and at his decease to be paid over to his wife, if living, but if not, to be paid over to his daughter Susie, a trust fund to be held by the executor during the life of said Charles H. Hall, and at his decease paid over to his wife, if living, and, if she be not then living, paid over to his daughter Susie? If not, to whom shall the executor pay over said sum?

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"18. Is a bequest to a cousin in the first degree of articles of furniture or ornament, in the will and codicil and memorandum or codicil of June 10, 1895, such a remembrance by a legacy in said will and codicils by the testatrix as to exclude the cousin so remembered from receiving a legacy of twenty-five hundred dollars under the clause in said memorandum or codicil, near the end thereof, giving 'to each of my cousins in the first degree who is not remembered by a legacy from me in my will and codicils, to each of such cousins I give the sum of twenty-five hundred dollars'?

"19. Some of the cousins in the first degree of the testatrix died before said memorandum or codicil of June 10, 1895, was made. Are the children or issue of each cousin in the first degree, so deceased, entitled under said memorandum or codicil to a legacy of twenty-five hundred dollars?

"The appraised value of the estate left by the testatrix, as per inventory, is $195,452.43."

Hearing before *Holmes*, J., who found various facts, and reserved the case for the consideration of the full court.

A. Hemenway, (*C. T. Duncklee* with him,) for the plaintiff, read the papers in the case.

A. J. Peters, for a cousin of the testatrix in the first degree.

C. E. Grinnell & E. R. Thayer, for other cousins in the first degree of the testatrix.

T. N. Perkins, (*J. C. Gray* with him,) for the Museum of Fine Arts.

J. Fox, for the daughters of Abby W. Hale.

C. R. Darling, for the children of certain first cousins who died before the date of the second codicil.

HOLMES, J. This is a bill for instructions brought by the executor of the will of Ann White Dickinson. The questions all concern the construction of a second codicil, entitled "Memorandum," which seems to have been drawn without the help of a lawyer, and which raises difficulties of the kind to be expected under such circumstances.

The second codicil begins by declaring that the testatrix gives "the remainder of articles, not previously disposed of, and declare that it is my will, or whoever may execute the same, shall deliver the articles of money, furniture, paintings, wearing ap-

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parel, personal articles, plate, carriages, horses, harnesses, and all other articles of a like nature hereinafter mentioned, to the respective persons as donors thereof as presents from me." By the third clause of her will she had given "all my personal effects," enumerated somewhat as above, to her executors, to be given by them to her friends. The first question is whether the second codicil revokes this clause, — or, putting it conversely, whether the second codicil defeats itself at once by the words "not previously disposed of," because the articles as to which it makes elaborate provisions are previously disposed of by the will, and therefore by the terms of the codicil above quoted are excluded from its operation. We are of opinion that the words "not previously disposed of" in the codicil do not refer to a previous disposal by the will. It was the purpose of the codicil to replace the will so far as it went. The words probably refer to a disposition executed by the testatrix in her lifetime. In this sense it is said in article 48 of the same instrument, "Having disposed of many articles treasured in life, and in the event of not disposing of the few others." So in article 1 she gives a small box "if not previously disposed of," and in article 2 orders the photographs of her father, mother, and husband to be destroyed "if not previously disposed of." This last provision most obviously could not refer to a previous disposition by will. The third section of the will is revoked by the second codicil. Our answer to this question also answers the similar question numbered 3, as to the revocation of the sixth or residuary clause of the will by the second codicil, that numbered 4 as to the revocation *pro tanto* of the second clause of the first codicil, and that numbered 5 as to whether there is any "remainder of articles not previously disposed of" left to be distributed by the second codicil.

In answer to the sixth question we are of opinion that the word "donors" is used by mistake for "donees."

The father of the testatrix left eighty thousand dollars to be deposited in the Hospital Life Insurance Company, in trust to pay the income to the testatrix for life, and gave her a power of disposition over the corpus of the fund by will. The testatrix, after directing by the fourth clause of her will that, if her own residue was not sufficient, this fund should be used to make good

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any deficiencies in her mother's charitable legacies, by the fifth clause appointed the fund, subject to the foregoing, to the Massachusetts Institute of Technology and the Boston Museum of Fine Arts. There are no deficiencies to be made good under the fourth clause, and the whole fund is well appointed to the two corporations named. This appointment is not modified by the codicils. Indeed, the second is stated not to be intended to dispose of any property over which the testatrix has a power of appointment. The second question put is whether, if the estate of the testatrix is insufficient to pay the legacies given in the second codicil, the fund in question is to abate proportionately. We are of opinion that there should be no such abatement by reason either of any expressed intention or of Pub. Sts. c. 127, §§ 28, 29. The fund is not the property of the testatrix, and should not be applied to her debts until her own property is exhausted. *Fleming* v. *Buchanan*, 3 DeG., M. & G. 976. It is asked also what interest shall be paid to the legatees. We presume that the terms of the original will were followed, and that the fund was identified by deposit in the Hospital Life office. Whether it still is there or what has become of it does not appear. If any interest has accrued since the death of the testatrix, it should follow the fund. No reason appears for allowing more than the actual increase of the fund.

The third article of the second codicil gives five thousand dollars to Abby W. Hale, and at her decease to her two unmarried daughters, — then to the survivor of them, and then to two married daughters. Abby W. Hale has died since the death of the testatrix. The seventh question is whether the fund is to be held by the executor in trust until the death of the two unmarried daughters, or is to be paid over to them. It is settled in this Commonwealth that, in the case of money, if no trustee is specially named or appointed, the executor is to hold the money in trust, and pay the interest only to the person entitled for life. *Field* v. *Hitchcock*, 17 Pick. 182, 183. *Homer* v. *Shelton*, 2 Met. 194, 206. *Hooper* v. *Bradbury*, 133 Mass. 303, 307. *Bullard* v. *Chandler*, 149 Mass. 532, 537. Our answer to this question also answers the thirteenth, with regard to the five thousand dollars given to Mrs. Joshua Lincoln for life by the twenty-second article, and the seventeenth, with regard to the like sum given by the thirty-fifth article to Charles H. Hall for life.

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The eighth question concerns "the old Vose mahogany table" and the "chromo of Lilacs," mentioned in article 3 of the codicil. The gift is absolute in terms to Abby W. Hale, "if living at my decease," and the gift to her daughter Mary and other daughters successively is only in case Abby is not living at the death of the testatrix. But in article 4 there is a gift over after the decease of Abby and her four daughters, and taking this into account, and other indications in article 5, we are of opinion that Abby took only a life interest, and are inclined to assume that her daughters were to take successive life interests at her death, whenever it happened. The table and chromolithograph will be handed to the daughter Mary, that being the rule as to chattels of this sort. *Homer* v. *Shelton*, 2 Met. 194, 206. The Vose clock, by the terms of article fifth, goes the same way as the table. But we do not see our way to cutting down the gift of the articles mentioned in article 6 to a life interest. The gift to Abby is absolute in terms, and there is no alternative except in case Abby is not living at the death of the testatrix. The reference to article 3 suggests a similar disposition throughout, but there is no limitation over or other indication of an intent to look beyond Abby's death if the things once vested in her. The objects inquired about in the tenth question should be given to the representatives of Abby W. Hale.

The cologne stand mentioned in the eighth article is to be delivered to Harriet W. Kennedy, as are also the objects mentioned in the ninth article.

The two sums of five thousand dollars mentioned in the twenty-third and twenty-fourth articles are to be held in trust, as in the cases already explained. Questions as to the future disposition of the fund we do not answer. *Bullard* v. *Chandler*, 149 Mass. 532. *Quincy* v. *Attorney General*, 160 Mass. 431, 437.

The sixteenth question, as to the gift of a hundred dollars a year by article 31, "should there be one or more persons at my decease but now not known in my employ who may have faithfully served me at home," is answered by the finding that the only persons answering the description are Martha L. Collins and Sarah Ellen O'Brien. The sum will be paid to each of them.

The last two questions concern the last gift in the codicil:

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"To each of my cousins in the first degree who is not remembered by a legacy from me in my will and codicils — to each of such cousins, I give the sum of twenty-five hundred dollars." We are of opinion that these words do not describe first cousins already deceased when the words were used, or the issue of such cousins, and therefore that such issue cannot take, whether the testatrix knew of the death of their ancestor or not. As there is no devise to their ancestor, they are not helped by Pub. Sts. c. 127, § 23. In cases like *Nutter* v. *Vickery*, 64 Maine, 490, although the ancestor was dead when the will was made, the will purported to make him or her a devisee. *Howland* v. *Slade*, 155 Mass. 415. *Sanderson* v. *Bayley*, 4 M. & C. 56. *Christopherson* v. *Naylor*, 1 Mer. 320, 326. *Parker* v. *Tootal*, 11 H. L. Cas. 143, 164, 166. *In re Musther*, 43 Ch. D. 569.

There is more difficulty in deciding whether those cousins who received a chromolithograph or a hat-stand were "remembered by a legacy" within the meaning of the codicil. There is such a want of proportion between the gifts of various small articles and the money, there is such an improbability that a first cousin, so far singled out as to receive a keepsake, should be excluded by the receipt of it from a benefit given to the least known of the class, that we are compelled to believe that legacy here is used in the sense of a pecuniary legacy, the meaning which the word most readily suggests to the unprofessional mind. It is argued with some plausibility that the testatrix used the word "bequests" in the same sense of pecuniary bequests in her will. She says, "I make no bequests to my relations because," etc., yet she gives all her personal effects other than money to her executors to be given to her friends, certainly including her relations.

Decree accordingly.

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HAMLET COLLAMORE *vs.* MARIA L. H. LEARNED & others.
ALONZO COLLAMORE *vs.* SAME.

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Suffolk. March 24, 1898. — May 18, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Motives as affecting the Validity of a Decree of Adoption — Evidence.

A request for a ruling that "it is not competent under the adoption law for a person in the senile age of life to adopt persons in the prime and vigor of life" is rightly refused.

At the trial of petitions to set aside decrees of adoption, the petitioners requested a ruling that "it is not competent under the adoption law for an adoption to be made for the purpose of operating simply as and to take the place of a last will and testament." The judge found that the adoption was not made for the purpose of so operating, but that it was an important purpose of the adopter to make the adopted persons his heirs at law with a view to take away any inducement that some of those who otherwise would have been his heirs might have to oppose his will. *Held*, that this motive was a proper one, and, if it were bad, it would not affect the validity of the decree, as the ruling asked seemed to suppose, however much it might affect the discretion of the court in making it, if put in evidence at the original trial. *Held, also*, that the same consideration would apply to the other rulings asked that the authority of the court could not be used to inflict private revenge or other object relating to third persons, to foster immorality, or to prevent the heirs at law from contesting a will, and that in view of the number of persons sought to be adopted, etc., and of the motives of those interested and of the facts surrounding the family, the decrees were invalid, even if they had not been disposed of by the judge's finding that the facts supposed were not true.

At the trial of a petition to set aside a decree of adoption, the petitioner offered in evidence the will and inventory of the adopter's mother as a step in the proof that he got most or all of his fortune from her, and that she cut off the parent of the adopted children with a small sum, the object being to show that the adoption, which was treated as standing on the same footing as a will, was unnatural and inconsistent with the adopter's duties. *Held*, that the evidence offered was rightly excluded.

TWO PETITIONS to the Probate Court to revoke decrees of adoption of the respondents by John H. Collamore. The cases were heard in this court on appeals taken by the petitioners before *Knowlton*, J., who refused to admit certain evidence and to give certain rulings, and dismissed the petitions; and the petitioners alleged exceptions. The first named petitioner was a nephew and the second named was the only child of a deceased

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nephew of the adopter. The respondents were the children of a brother of the adopter. The facts appear in the opinion and in a note thereto by the reporter.

H. C. Whitney, for the first named petitioner.

R. M. Morse & E. B. Hale, for the respondents.

HOLMES, J. These are petitions to set aside decrees of adoption by one John H. Collamore of three persons, his nieces and nephew. At the time, Collamore was seventy, and the adopted children were respectively forty-three, thirty-nine, and twenty-five years old. At the trial of the case in this court, on appeal from a decree of the Probate Court dismissing the petition, the following rulings were asked and refused, and exceptions were taken.

First. "It is not competent under the adoption law for a person in the senile age of life to adopt persons in the prime and vigor of life." Such is not the law. Pub. Sts. c. 148, § 1.

Second. "It is not competent under the adoption law for an adoption to be made for the purpose of operating simply as and to take the place of a last will and testament." The court found as facts that the adoption was not made for the purpose of operating simply as suggested, but that it was an important purpose of Collamore to make the adopted persons his heirs at law, with a view to take away any inducement that some of those who otherwise would have been his heirs might have to oppose his will. This motive is a perfectly proper one, and, if it were bad, it would not affect the validity of the decree, as the ruling asked seemed to suppose, however much it might affect the discretion of the court in making it, if put in evidence at the original trial. The same consideration would apply to the other rulings asked, if they had not been disposed of by the judge's finding that the facts supposed were not true.*

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* The other rulings asked were:

"It is not competent under the adoption law to use the law and the authority of the court thereunder for the purpose of inflicting private revenge or other object relating to third persons outside of the adopter and adopted.

"It is not competent to use the adoption law and the action of the court thereunder to foster, encourage, or protect immorality or improper behavior, or for the purpose of preventing the heirs at law from contesting a will or protecting their rights.

"In view of the number of persons sought to be adopted, the ages and

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The will and inventory of Collamore's mother were offered in evidence, as a step in the proof that he got most or all of his fortune from her, and that she cut off the parent of the adopted children with a small sum, the object being, as explained to us, to show that the adoption, which is treated as standing on the same footing as a will, was unnatural and inconsistent with Collamore's duties. But an adoption is not a will. Collamore owed no duties of the kind supposed, and the facts offered, if proved, would not have shown any restriction, legal or moral, upon his absolute freedom in dealing with his property directly by will, or in affecting it indirectly by instituting an heir. No reason is shown why the decree for adoption should be disturbed.

Exceptions overruled.

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ANCHOR ELECTRIC COMPANY & others *vs.* HORATIO C. HAWKES.

Suffolk. March 24, 25, 1898. — May 18, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Valid Agreement not to compete in Business — Public Policy.

H., M., and R., each of whom was the business manager of a corporation and a shareholder therein, on September 29, 1894, agreed in writing to form a new corporation, of which they were to be officers and directors. Each corporation was to sell its assets and good will to the new corporation, and each of these persons was to take one third of the capital stock of the new corporation and devote himself unreservedly to its interests. There was also a stipulation as to salaries, the allowance for assets of the three corporations, and as to the agreement being binding on approval of a majority of the shareholders or boards of directors of the three corporations. The A. Company was duly incorporated in accordance with the contract. On October 12, 1894, a written agreement was made between the A. Company and the other three corporations, whereby the assets and good will of the three were transferred to the A. Company, and the three agreed to discontinue business. The agreement, which was signed by each of the four corporations and by their officers, H., M., and R., contained the following stipulation: "6. It is further agreed by all the persons whose names are set hereunder, officers of the corporations herein above described, that they will

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conditions, and of the minds, motives, and purposes of the persons interested, and of the facts surrounding the family affected, these decrees were not valid nor of binding force or effect."

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not hereafter at any time, directly or indirectly, as partner, agent, officer of a corporation, or in any other wise, enter into or conduct or assist in conducting any business that shall in any way interfere with or compete with the proposed business of said A. Company for a period of five years; except that any one of said persons sever connection with said A. Company as provided by paragraph six of said agreement of September 29, 1894." The A. Company brought a bill in equity to restrain H. from competing with it contrary to article 6. The judge found that the instrument had been executed except this article, and had been adopted by the corporations; that the defendant sold his stock in the new corporation and withdrew from it, contrary to an article in the contract of September 29, to the effect that any one of the three could, in a certain event, sell his stock in the new corporation to the others at a price to be agreed upon or fixed by arbitration; that the defendant had violated and intended to violate article 6 of the contract of October 12; that all the allegations of the bill as to the validity of this article were proved; that, so far as he could find, this article was reasonable and necessary for carrying out the agreement; that the value of the stock of H.'s company was largely dependent upon the keeping of this agreement and the business of the A. Company was of a nature that might extend over the whole country. *Held*, that the stipulation of article 6 of the contract of October 12 was valid.

BILL IN EQUITY, filed February 1, 1898, to restrain the defendant from competing with the plaintiffs in violation of a contract. Hearing before *Holmes*, J., who ordered an injunction against the defendant carrying on business in Boston, where he had established himself, or the vicinity, and, at his request, reported the case to the full court. If the ruling was right, the injunction was to stand, and the case was to go to a master to assess damages, otherwise, such decree was to be made as equity might require. The facts appear in the opinion.

F. Hutchinson, for the defendant.

S. L. Whipple, (*W. R. Sears* with him,) for the plaintiffs.

KNOWLTON, J. The only question which we need to discuss in this case is whether the stipulation on which the bill is founded is void as against public policy. The stipulation is as follows: "6. It is further agreed by all the persons whose names are set hereunder, officers of the corporations herein above described, that they will not hereafter at any time, directly or indirectly, as partner, agent, officer of a corporation, or in any other wise, enter into or conduct or assist in conducting any business that shall in any way interfere with or compete with the proposed business of said Anchor Electric Company for a period of five years; except that any one of said persons sever connection with said Anchor Electric Company as provided by paragraph six of

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said agreement of September 29, 1894." The defendant was the business manager of the Hawkes Electric Company, a corporation, and a shareholder therein; Norman Marshall was the business manager of the Iona Manufacturing Company, a corporation, and a shareholder therein; and Philip M. Reynolds was the business manager of the Brown Electric Company, a corporation, and a shareholder therein. On September 29, 1894, these three persons entered into an agreement in writing to form a new corporation under the laws of Maine, of which Hawkes was to be the president, Reynolds the treasurer, and Marshall the vice president and assistant secretary, and of which these three were to be the managing board of directors. Four other persons were to be selected to make up the full board of directors, of whom one was to be chosen from the board of directors of each of the above mentioned corporations. Each of these corporations was to sell all its assets to the new corporation, at their actual cash value, to be determined as provided in the writing, and an agreed price of a substantial amount fixed by the writing was to be allowed by the new corporation for the good will of each of the three corporations. Each of these three persons was to subscribe for and take one third of the capital stock of the new corporation, and the assets of each of the three corporations, at the value ascertained as provided by the writing, were to be received *pro tanto* by the new corporation in payment for this stock, and the balance was to be paid for by the subscribers in cash. The three persons severally agreed that so long as the agreement should continue they would "devote themselves unreservedly to the interest and duties of the office which they occupy and the promotion in every way of the interests of the corporation to be formed." On the back of the writing was an agreement, signed by the three, fixing the salaries which they were severally to receive in the new corporation, and an additional stipulation as to the allowance for assets of the three corporations. It was provided that the agreement should be binding only as approved by a majority of the shareholders or boards of directors of the three corporations. The Anchor Electric Company was afterwards established as a corporation under the laws of Maine, in accordance with the contract. In this connection there was another agreement made on October 12, 1894, between the Anchor

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Electric Company and the other three corporations, whereby the assets and good will of the three were transferred to the new corporation at specified agreed prices, which were paid in stock of the new corporation. A part of this agreement of the three old corporations with one another and with the Anchor Electric Company was in these words: "They will not hereafter at any time continue the business of manufacturing and dealing in electrical goods or specialties of any sort or description, after the fifteenth day of October, 1894, except to sell and dispose of merchandise on hand at this date not herein transferred to the Anchor Electric Company, and will do no business of any sort or description except such as is necessary in the liquidation of said three electric companies." The agreement was signed by each of the four corporations, by their respective officers, Hawkes, Reynolds, and Marshall, and the stipulation in question was the sixth article of the agreement. The judge found that the instrument had been executed in all its parts, except this sixth article, and had been adopted by the corporations. There was a provision in the first agreement whereby any one of the three persons could withdraw from the new corporation if he was at any time put at a financial disadvantage by the other two in reference to salary or income, and could sell his stock to the others at a price to be agreed upon or fixed by arbitration. The judge before whom the case was heard found that the defendant sold his stock in the new corporation and withdrew from it, but not under the provision above referred to, and that he has violated and intends to violate the sixth article of the last agreement. He found that all the allegations of the bill bearing upon the validity of the sixth article were proved. He also found as a fact, so far as he could properly so find, that the sixth article was reasonable and necessary for the carrying out of the transactions set forth in the agreement, and that the value of the stock of the Hawkes Electric Company was largely dependent upon its being kept. It is found that the business of the plaintiff is of a nature that may extend over the whole country. We are thus brought to a consideration of the law applicable to the case.

From very early times certain contracts in restraint of trade have been held void as against public policy. They are objec-

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tionable on two grounds: they tend to deprive the party restrained of the means of earning a livelihood, and they deprive the community of the benefit of his free and unrestricted efforts in his chosen field of activity. The distinction was long ago taken between contracts involving a partial restraint of trade and contracts involving a general restraint of trade, the former being held valid if not unreasonable, and the latter invalid. The changes in the methods of doing business and the increased freedom of communication which have come in recent years have very materially modified the view to be taken of particular contracts in reference to trade. The comparative ease with which one engaged in business can turn his energies to a new occupation, if he contracts to give up his old one, makes the hardship of such a contract much less for the individual than formerly, and the commercial opportunities which open the markets of the world to the merchants of every country leave little danger to the community from an agreement of an individual to cease to work in a particular field. The general principle that arrangements in restraint of trade are not favored is, however, firmly established in law, and now, as well as formerly, is given effect whenever its application will not interfere with the right of everybody to make reasonable contracts. Whenever one sells a business with its good will, it is for his benefit, as well as for the benefit of the purchaser, that he should be able to increase the value of that which he sells by a contract not to set up a new business in competition with the old. The right to make reasonable contracts of this kind in connection with the sale of the good will of a business is well established. But the particular provisions which are reasonably necessary for the protection of the good will of many kinds of business are very different now from those required in the days of Queen Elizabeth. Then the courts had occasion to inquire whether a limitation upon the right to engage in the same business as that sold was unreasonable because it included a town instead of a single parish, or extended a distance of ten miles instead of five. Now the House of Lords in England has held by a unanimous decision in a recent case that such a limitation which covered the whole world was not unreasonable. Because in early times it seemed inconceivable that an agreement to refrain from establishing a

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business of the same kind anywhere in the kingdom should be necessary to the protection of the good will of any existing business, it was laid down as an arbitrary rule that agreements so comprehensive in their terms were void. Thus the distinction between a general restraint of trade and a partial restraint of trade grew up. Contracts applying to any territory less than the whole kingdom were considered in reference to their reasonableness, having regard to the purpose for which the contract was made. By the unanimous decision of the House of Lords in the case of *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co.* [1894] App. Cas. 535, affirming the unanimous judgment of the Court of Appeals in [1893] 1 Ch. 630, it is now settled in England that a covenant unrestricted as to space, not to engage in a particular kind of business for twenty-five years, made in connection with the sale of the property of a manufacturing establishment, is valid, if, having regard to the nature of the business and the limited number of its customers, it is not wider than is necessary for the protection of the covenantee, nor injurious to the public interests of the country, as were found to be the facts in that case. The earlier English authorities are reviewed at length in the opinions, and it is unnecessary to refer to them here. Arbitrary rules which were originally well founded have thus been made to yield to changed conditions, and underlying principles are applied to existing methods of doing business. The tendencies in most of the American courts are in the same direction. *Oakdale Manuf. Co.* v. *Garst*, 18 R. I. 484. *Fowle* v. *Park*, 131 U. S. 88, 97. *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64. *Tode* v. *Gross*, 127 N. Y. 480. *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473. *Whitney* v. *Slayton*, 40 Maine, 224. *Western Wooden Ware Association* v. *Starkey*, 84 Mich. 76.

In this Commonwealth the general doctrine of the cases seems to be that, in connection with the sale of the good will of a business, the vendor will be bound by any covenant which is reasonably necessary for the preservation and protection of the property which he sells. *Pierce* v. *Fuller*, 8 Mass. 223. *Perkins* v. *Lyman*, 9 Mass. 522. *Stearns* v. *Barrett*, 1 Pick. 443. *Palmer* v. *Stebbins*, 3 Pick. 188. *Pierce* v. *Woodward*, 6 Pick. 206. *Angier* v. *Webber*, 14 Allen, 211. *Dean* v. *Emerson*, 102 Mass. 480.

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Morse Twist Drill & Machine Co. v. *Morse*, 103 Mass. 73. *Boutelle* v. *Smith*, 116 Mass. 111. *Ropes* v. *Upton*, 125 Mass. 258. *Handforth* v. *Jackson*, 150 Mass. 149. In cases in which such covenants have been held bad they were deemed to go further than was reasonable to give full value to the property sold. In *Bishop* v. *Palmer*, 146 Mass. 469, relied on by the defendant, the covenant was unrestricted as to space, and was made in connection with the sale of the property and good will of a local business, not peculiar in its nature, for the protection of which so extensive a covenant was held to be unnecessary. The case of *Gamewell Fire Alarm Telegraph Co.* v. *Crane*, 160 Mass. 50, is not inconsistent with the contention of the plaintiffs. It is said in the opinion, that the "plaintiff did not buy the good will of a mercantile business, and the defendant Crane had no customers for fire alarm and police telegraph machines and apparatus." A ground of the decision, stated by a majority of the court, is as follows: "The stipulation seems to us to be something more than is reasonably necessary to protect the plaintiff in the enjoyment of the property it bought, even if that should be adopted as the test, upon which we express no opinion."

Inasmuch as the stipulation in the present case is only to do no business for five years that shall interfere with or compete with the proposed business of the Anchor Electric Company, it seems quite clear under the authorities in Massachusetts that the stipulation goes no further than is reasonably necessary to protect the good will of the business sold by the defendant's corporation, and that it should therefore be held valid, unless a distinction is to be made between competition with the business of the Anchor Electric Company and competition with the business sold by the defendant and his company. The business sold by the defendant was chiefly installing and constructing electric plants and appliances. The business of the new corporation included with this that which formerly was done by the other two companies, namely, manufacturing and dealing in electrical appliances.

In considering this branch of the case, the nature of the contract of sale should be regarded. The defendant's business was sold to be conducted as a part of a new and more general business. Very likely the price paid for it was larger, and the good

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will was deemed more valuable because it was to be so conducted. The plaintiff corporation carried on different but closely connected departments of the electrical business, and the different departments were so related to one another that sometimes it would be difficult, if not impossible, to distinguish between competition with one department and competition with another.

Moreover, this was a contract for mutual profit in conducting the new business, which, under the findings of the court, has all presumptions in its favor. Each party was to devote himself to the interests of the new corporation. Although the parties provided for the establishment of a corporation, their arrangement was in the nature of a copartnership. The profits of the new corporation were to be shared by the old corporations, which had sold their property and become stockholders in the new one. It is difficult to see any good reason why the contract of the three persons to promote the interests of the new corporation should not be binding upon them. This contract necessarily includes the agreement not to enter into competition against the new corporation. The case seems to come within the language of Chief Justice Chapman in *Morse Twist Drill & Machine Co.* v. *Morse*, 103 Mass. 73, 75, where he says the "defendant did not technically become a partner with the plaintiffs, yet he became the associate of the other stockholders in the business, he himself inducing them to join him in it, and having a large interest in the formation of the company; and the same principle that enables a partner to bind himself to do nothing in competition with the business of the firm ought to apply to him."

We are of opinion that the stipulation not to compete with the business of the plaintiff corporation is as binding on the defendant as if it were merely not to compete with such business as previously had been done by the Hawkes Electric Company.

Decree for the plaintiffs.

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RHODES LOCKWOOD & another, administrators, *vs.* LEWIS A. ROBERTS.

Suffolk. March 24, 1898. — May 18, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Partnership — Accounting — Interest — Evidence of Surviving Partner — Finding of Master.

Where, in a suit for an accounting, the testimony of the surviving partner on his contention that he is entitled to interest on a certain share of the partnership assets is discredited by the master, if there is nothing to outweigh the master's finding and the accounts, a decree is properly entered for the administrators of the deceased partner.

BILL IN EQUITY, filed August 28, 1894, by Rhodes Lockwood and Arthur Lincoln, special administrators of the estate of Thomas Niles, who died on May 18, 1894, against Lewis A. Roberts, surviving partner of the firm of Roberts Brothers, for a receiver and an accounting. The defendant appealed from the final decree entered by a single justice of this court, the nature of which, together with the material facts, appears in the opinion.

S. J. Elder, (*E. A. Whitman* with him,) for the defendant.

E. W. Hutchins, for the plaintiffs.

HOLMES, J. The case has been before a master, and afterwards before a justice of this court, on the master's report of his findings and of the evidence. It comes here on appeal from so much of the final decree only as overrules the third exception to the master's report, and disallows the defendant's claim for $8,910.20 interest.

The claim for interest arises in this way. The defendant Roberts took the deceased partner, Niles, into partnership in an established publishing business in 1872. The cash and accounts receivable, amounting to $56,254.43, were treated as cash lent to the firm, and were credited as cash to Roberts. Certain house rents also were put in by him as they were collected from time to time, and also were credited to his account. On the other side he was charged with the cash which he drew. So long as a

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balance remained in his favor upon the account kept in this way, he was credited with interest upon the books, but after that he was not credited with any. In other words, no profits were credited in the account, and all drafts were treated as drawn against the other items above mentioned. The drafts of Niles, on the other hand, necessarily were against profits, as he had nothing else to draw against. But, as there had been no division of profits, almost all the items on his account were debits. The accounts of both partners at the end showed a large debit balance for this reason, although the firm had been making money.

The books were kept by Niles, or by a bookkeeper under his direction, and the defendant says that he did not know how the account was made up, and testifies to an agreement with Niles by which he was to have interest at seven per cent on any money he had in the business over and above what Niles had. A memorandum was found in Niles's handwriting, but unsigned, computing interest at five per cent on yearly balances. The profits were considerable, and of course, if his share had been credited to Roberts or had been set against his drafts, it would have made a great difference in the interest account. This difference is the sum in dispute.

The difficulty with the defendant's claim, so far as it rests on express agreement, is that the master who saw the witness found against it. It is unnecessary to cite cases on the weight due to such a finding. No conclusion can be drawn from Niles's unsigned memorandum. On the other side are the accounts as they were kept in the firm books for a long series of years, or, more specifically, the fact that they show on their face that no interest has been allowed to Roberts since 1875. The master finds that the defendant must have known the fact. There are no general principles which outweigh the reasonable presumptions to be drawn from a long course of accounts uncontrolled by testimony, as we must take these accounts to be in view of the master's finding. *Winchester* v. *Glazier*, 152 Mass. 316, 324, 325. *Harris* v. *Carter*, 147 Mass. 313, 315. It is true that the undivided profits served the uses of capital, and sometimes enabled the firm to lend money at interest, but that is not enough to overcome the books and the master's report.

Decree affirmed.

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171 111
180 [1]108
180 [2]222

PHILIP RAPHAEL *vs.* JAMES F. MULLEN & another.

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e204 [4]417

Suffolk. March 25, 1898. — May 18, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Insolvent Debtor — Trust — Evidence — Equity — Finding of Master — Decree — Discharge in Insolvency.

Oral evidence is admissible to show that a bill of sale of personal property, although absolute in form, was made in trust or by way of security.

The obligation of a person to whom a debtor has conveyed property in trust, to repay to the latter the residue of the proceeds of the property after the object of the trust has been accomplished, is not released by the trustee's discharge in insolvency.

BILL IN EQUITY, filed in the Superior Court, January 15, 1895, against James F. Mullen and Peter Williams, to compel the defendants to refund the residue of the proceeds of certain property conveyed by the plaintiff to them. A decree was entered dismissing the bill, by consent of all parties, against the defendant Williams, and adjudging that the defendant Mullen held in trust a certain sum for the use and benefit of the plaintiff, and ordering payment of the same; and Mullen appealed to this court. The facts appear in the opinion.

W. O. Kyle, for Mullen.

A. Hemenway, (*R. R. Gilman* with him,) for the plaintiff.

HOLMES, J. This is a bill to compel the restoration of funds, the residue of the proceeds of the plaintiff's stock in trade. He made an assignment for the benefit of creditors, but later went into insolvency. He then made an offer of composition and executed a bill of sale of the property previously assigned to the same assignees, of whom the defendant Mullen was one. The other, Williams, is out of the case by agreement. The bill alleges that this bill of sale, although absolute in form, was given only as security to Mullen and Williams for such money as they should advance in order to pay the offer of composition; and it seeks an account and repayment of the balance. The case was sent to a master, who found that the bill of sale conveyed, not an absolute title, but simply a title in trust to hold as under the previous assignment. The Superior Court

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made a decree in accordance with the master's report, so far as now is material, and the defendant Mullen appealed. The evidence taken by the master is attached to his report, and is brought before us by the appeal.

The main question raised concerns the finding of the master just stated. It is argued in the first place that oral evidence is not admissible to qualify the bill of sale. But it is so well settled that such a conveyance, although absolute in form, may be shown to have been made in trust or by way of security, that it is not necessary to do more than cite a few cases. *Newton* v. *Fay*, 10 Allen, 505. *Campbell* v. *Dearborn*, 109 Mass. 130. *Minchin* v. *Minchin*, 157 Mass. 265. *Riley* v. *Hampshire County National Bank*, 164 Mass. 482, 486. Then it is said that there was no evidence to warrant the master's finding. But the lawyer who acted for the plaintiff, and who witnessed the bill of sale, testified that, after many conversations with Mullen and Williams and their attorney, it was agreed finally that the plaintiff should give an absolute bill of sale to them to secure them, and that they should then carry out the terms of the composition, and that the balance, after satisfying them as to their fees and disbursements, was to be given to the plaintiff. Indeed, the defendant himself on cross-examination assented to the proposition that the bill of sale was given by way of security. It is very plain that we cannot set aside the master's finding.

Some argument is directed against the proposition that the defendant now holds the property under the original assignment. But that was not the finding of the master or the language of the decree, which follows the master's words. The language is that the bill of sale conveyed the property to Mullen and Williams, "to hold in trust as they had held it under the assignment." Of course even this language is not accurate. It does not mean that the bill of sale created a trust for creditors. But it does mean that it created a trust, with the same obligation as under the assignment to keep the fund identified and distinct, and with the same duty to hold for and pay over to Raphael any residue there might be.

Finally, it is urged that if the bill and the facts show any claim on the part of the plaintiff, it is only a debt, and not a

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claim by way of trust, and that it is barred by a discharge in insolvency granted to Mullen in July, 1895. (The bill of sale was dated December 7, 1893.) We do not so read the bill, which prays that the defendants may be declared trustees and ordered to refund the money received by them in excess of payments, etc. As to the facts, the master finds a trust, not a debt. This being so, the obligation of the defendant Mullen is not discharged. Pub. Sts. c. 157, § 84. St. 1884, c. 236, § 9. St. 1890, c. 387. The cases under the United States Bankrupt Law do not apply. They started from the case of a factor, (*Chapman* v. *Forsyth*, 2 How. 202, and *Hayman* v. *Pond*, 7 Met. 328,) who, in this Commonwealth at least, is not bound to keep the proceeds of goods sold by him distinct, but is authorized to mingle them with his own funds; that is to say, to make himself simply a debtor for the amount. *Vail* v. *Durant*, 7 Allen, 408. Probably the same was thought to be true in *Cronan* v. *Cotting*, 104 Mass. 245, 247, 248, which is the strongest case cited. *Hennequin* v. *Clews*, 111 U. S. 676. The same assumption is made as to an executor in *Waller* v. *Edwards*, Litt. Sel. Cas. 348, 350. The law of Massachusetts is otherwise. See *Marvel* v. *Babbitt*, 143 Mass. 226. The decision in *Chapman* v. *Forsyth* was put on the ground that the words of the act referred only to technical trusts. See also *Woodward* v. *Towne*, 127 Mass. 41. In the present case, in view of the previous relations of the defendant to the fund and the testimony as to what was said, a finding was warranted that a trust in the strictest sense was meant, and that the assignees were expected to keep the fund separate and to turn over what was left. If such a trust obligation is discharged, we are at a loss to know what obligations are excepted by § 84.

Decree affirmed.

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HENRY W. PEABODY & others *vs.* LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

Suffolk. November 15, 16, 1897. — May 19, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Marine Insurance — Construction of Policy — "Specific Insurance."

A policy of marine insurance, issued under an agreement with the assured by which all merchandise belonging to him shall be insured from the moment that it becomes his property in a certain place until forty-eight hours after the discharge of the vessel in the port of delivery, although, while the rate of premium is fixed, the exact amount of the insurance and of the premium cannot be known until the receipt of the invoice, which sometimes is not until several days after the arrival of the vessel, is a contract for "specific insurance" on each cargo.

CONTRACT, upon a policy of insurance for $10,000, against loss by fire on property of the plaintiffs in Boston, for one year from July 31, 1895. Trial in the Superior Court, before *Hopkins*, J., who directed the jury to return a verdict for the plaintiffs; and, at the defendant's request, reported the case for the consideration of this court. The facts appear in the opinion.

The case was argued at the bar in November, 1897, and afterwards was submitted on briefs to all the justices.

W. C. Loring & R. S. Gorham, for the defendant.

H. M. Rogers, for the plaintiffs.

LATHROP, J. The question in this case is whether the policy declared on attached to the goods which were destroyed by fire on September 4, 1895. The description of the property insured was set forth in a rider pasted to the policy, which contained the following clause: "It is further declared and agreed that goods on which the insured have specific insurance are not covered in whole or in part by this policy, and that the same is not intended to attach to such goods in whole or in part."

The plaintiffs had other insurance by two marine policies, which covered the goods at the time of the loss, and these companies have paid what belonged to them to pay according to the terms of each policy; but the actual loss suffered by the plain-

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tiffs amounted to more than the sums thus paid, and if the defendant's policy attached, it is liable to pay $1,830.50, with interest. If the insurance effected by the marine policies is "specific insurance" then the defendant is not liable; otherwise, the policy attached.

Before proceeding to discuss the nature of the other insurance, we may briefly consider the policy declared on. It is designated on the back thereof, "Floating Policy." As was said by the court in *Fairchild* v. *Liverpool & London Ins. Co.* 51 N. Y. 65, 69, it is "intended to cover property or value which cannot well be covered by specific insurance from the circumstance that it is changing in quantity or location. The ordinary purpose of such a policy is to supplement specific insurances and to cover values not covered by them. Here the plaintiffs' property would sometimes be in one warehouse and sometimes in another, and sometimes on wharves or *in transitu* over the streets, and sometimes above the specific insurances and sometimes under them in value. Hence, the necessity for this floating policy to attach to the property wherever it might be, and in all cases when it happened to exceed the specific insurances."

There are two kinds of floating policies in use, one as in the case before us which does not attach at all to goods covered by specific insurance, and the other, which was the one before the court in the New York case above cited, which insures goods covered by specific insurance for the excess in value above the amount of the specific insurance. The language of the court must be construed in connection with this fact.

The two marine policies were what are known as blanket policies. They were issued under an agreement with the plaintiffs by which all merchandise belonging to them should be insured from the moment that it became their property in Yucatan, until forty-eight hours after the discharge of the steamer in Boston. While the rate of premium was fixed, the exact amount of the insurance and of the premium could not be known until the receipt of the invoice, and this sometimes did not reach the plaintiffs until some days after the arrival in Boston of the steamer carrying the goods; and in the case before us, the invoice did not arrive until after the loss. The marine companies were notified before the loss of the intention of the

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plaintiffs to insure this cargo, but the details could not be accurately determined until the arrival of the invoice. There can be no question that these companies could not have avoided their liability. *E. Carver Co.* v. *Manufacturers' Ins. Co.* 6 Gray, 214.

The marine policies were general contracts for specific insurance on each cargo. It can make no difference whether a separate policy is issued for each risk, or one policy for all risks, each of which is separately identified by the invoice value, or by that value plus a certain percentage. In our opinion such insurance as was effected by the marine companies on each cargo was as much specific insurance as if a separate policy had been issued on that cargo.

The result is that the policy declared on did not attach to the cargo in question. *Verdict set aside.*

JOSEPH H. GRAY, trustee, *vs.* CENTRAL MASSACHUSETTS RAILROAD COMPANY, appellant.

Suffolk. December 14, 1897. — May 19, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Trust Mortgage — Title to Fund — Railroad Lease — Construction of Indenture — "Property."

A railroad corporation gave a mortgage of its property to trustees to secure the payment of an issue of bonds. This mortgage was subsequently foreclosed, and the property bought in at the sale by a committee acting for a portion of the bondholders, under an agreement and statutory authority. In accordance therewith the corporation was reorganized, and a portion of the former bondholders took preferred stock in the new corporation, in exchange for their bonds in the old corporation. The purchasing committee paid on account a certain sum, which was received and held by the trustees, who, upon a confirmation of the sale by a decree of court, conveyed the property to the committee, who then conveyed it to the new corporation. Coupons to a large amount were in litigation until nine years later, when they were all obtained and cancelled. *Held*, that the right to the fund so held by the trustees did not revert to the committee, but passed to the new corporation.

An indenture of lease, executed by two railroad corporations, contained the following clause: "The lessor doth hereby grant, demise, and lease unto the lessee its railroad and railroad property of every description, both as the same now

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exists and it shall exist after the location, construction, completion, and equipment of said railroad from C. to N. as herein provided, and the location, construction, and equipment of said branch or extension of said railroad as above specified, including therein its railroad, lands, and all real estate, rights, and appurtenances connected therewith, within this Commonwealth; also all branches, tracks, side tracks, and the land on which the same are located, roadbeds, superstructure, gravel pits, station-houses, depots, viaducts, bridges, piers, wharves, shops, buildings, fixtures, water tanks, engines, tools, cars, rolling stock, machinery, furniture, telegraph apparatus, poles, and equipments of every kind, material and supplies, and all personal property and estate owned by said lessor; also all rights, franchises, and easements, privileges, and appurtenances belonging to said lessor in connection with said railroad, together with the right to fix, demand, and receive all tolls, rent, revenue, income, and profits of the demised railroad and premises, and the right to run, manage, and control the same, subject to the provisions of its charter and of the laws of this Commonwealth." *Held*, that the right which the lessor had in a fund received by the trustees under a mortgage of the railroad property given by its predecessor to secure the payment of bonds, from a committee of the bondholders purchasing at a foreclosure sale, passed to the lessee under the clause above quoted.

APPEAL from a decree of the Probate Court, ordering that the balance of a trust fund in the hands of the appellee, less any proper deductions, be paid to the Boston and Maine Railroad, together with all interest accrued thereon. The case was submitted to this court, and, after a decree affirming the decree of the Probate Court, to the full court, on appeal, upon agreed facts, in substance as follows.

On January 1, 1880, the Massachusetts Central Railroad Company issued certain bonds, to secure the payment of which it gave a trust deed or mortgage of its property to three trustees.

This mortgage was subsequently foreclosed, and the property was bought in at the foreclosure sale in May, 1883, by persons acting as a committee of the bondholders, under a memorandum dated January 20, 1883, and under St. 1883, c. 64. In accordance therewith the railroad corporation was thereupon reorganized as the Central Massachusetts Railroad Company, and all the former bondholders except one took preferred stock in the new corporation in exchange for their bonds in the Massachusetts Central Railroad Company.

The price bid for the property by this committee at the foreclosure sale was $500,000, and the sum actually paid in cash was $20,000, which was paid into court, the rest of the purchase money being ultimately paid by surrender of the bonds of the Massachusetts Central Railroad Company. This fund of $20,000

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was deposited by the trustees in a bank in their names as trustees. The sale was confirmed by a final decree of the Supreme Judicial Court on November 17, 1883, declaring the mortgage foreclosed, but making no order as to a distribution of the proceeds of the sale; and thereupon the trustees conveyed the property to the bondholders' committee, and this committee in turn conveyed to the new corporation on November 24, 1886. Coupons to the amount of some $150,000 were in litigation until 1895, when the same were all obtained and cancelled.

The new corporation, now reorganized as the Central Massachusetts Railroad Company, leased its property, both real and personal, to the Boston and Lowell Railroad Corporation on December 7, 1886.

The indenture of lease, after reciting that the lessor was desirous of completing and equipping its railroad, which had been located and partially constructed, and of leasing the same so completed and equipped to the lessee for a term of years, and the lessee desired to aid the lessor in constructing the railroad by taking its bonds, provided that the lessor should forthwith issue, sell, and deliver to the lessee its first mortgage coupon bonds to the amount at par value of two millions of dollars; that after such sale and delivery of the bonds, and as the full price therefor, the lessee should pay and discharge all certificates of indebtedness issued to and held by it under the contract then existing between the parties to the indenture, and by virtue of St. 1885, c. 329, amounting to $200,000, and should discharge any other liabilities or encumbrances necessary to be removed in order to confirm the title of the trustees of the mortgage securing the bonds so issued, such liabilities and encumbrances to be established to the satisfaction of the lessee and not to exceed $150,000; that the lessee should retain in its hands the price to be paid for the bonds, and the same should be applied to the payment of the sums agreed to be paid in the contracts for the construction and equipment of the railroad, and for the payment of the certificates of indebtedness, land damages, and liabilities and encumbrances to confirm the title; and also provided as follows: "The lessor doth hereby grant, demise, and lease unto the lessee its railroad and railroad property of every description, both as the same now exists and it

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shall exist after the location, construction, completion, and equipment of said railroad from North Cambridge to Northampton, as herein provided, and the location, construction, and equipment of said branch or extension of said railroad as above specified, including therein its railroad, lands, and all real estate, rights, and appurtenances connected therewith, within this Commonwealth; also all branches, tracks, side tracks, and the land on which the same are located, roadbeds, superstructure, gravel pits, station-houses, depots, viaducts, bridges, piers, wharves, shops, buildings, fixtures, water tanks, engines, tools, cars, rolling stock, machinery, furniture, telegraph apparatus, poles, and equipments of every kind, material and supplies, and all personal property and estate owned by said lessor; also all rights, franchises, and easements, privileges, and appurtenances belonging to said lessor in connection with said railroad, together with the right to fix, demand, and receive all tolls, rent, revenue, income, and profits of the demised railroad and premises, and the right to run, manage, and control the same, subject to the provisions of its charter and of the laws of this Commonwealth."

The indenture provided further that the demised property was to be held for the term of ninety-nine years; that the lessee should "take possession of said railroad and premises as soon as this lease is signed, and, after taking possession of said railroad and premises, under the terms of this lease," the lessee should pay to the lessor rent for the leased premises, the rent to begin as soon as any bonds should be issued, and to be a sum sufficient to pay the interest on the bonds, and when the railroad had been constructed the rental was to be a certain percentage of the gross receipts from the operation of the railroad; that the lessee should at the end of the term "surrender the demised real and personal estate in the like good order and condition in which they are received by the lessee, or may be put during the term by the lessor"; that "to prevent uncertainty as to the property herein demised and to be accounted for upon the termination of this lease, and as to its condition when delivered to this lessee, there shall be made at the time of such delivery a full, complete, and particular inventory, description, and appraisal of all the estate, real and personal, belonging to the lessor, and coming

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into the possession of the lessee by virtue of this lease"; and that the "lessor hereby authorizes said lessee, at its discretion, to sell and dispose of such of the rolling stock, equipment, and such other personal property herein demised as said lessee may deem advisable, and to remove and take down at its discretion such buildings, structures, and fixtures as it shall deem prudent, and to dispose of the same; . . . and said lessee agrees to replace such rolling stock, fixtures, and buildings with other improvements and property of like kind and equal value, and in case such property is not replaced to account for its value to said lessor."

The Boston and Lowell Railroad Corporation thereafter leased its road, and all property held by it under the lease, to the Boston and Maine Railroad. Both of these two leases are now in force.

The balance of cash paid by the committee of bondholders to the trustees at the foreclosure sale above referred to constitutes the fund in controversy. Certain deductions for expenses and charges have been made, so that it now amounts to $13,405.17. The original trustees have all died since the reorganization, and the appellee holds the fund as their successor under a decree of the Probate Court. The appellee claims no interest in the fund, and the purchasing committee of the bondholders has filed a disclaimer authorizing its payment to the Central Massachusetts Railroad Company. The only question is between the Boston and Maine Railroad, which claims by virtue of the lease of the Central Massachusetts Railroad Company to the Boston and Lowell Railroad Corporation, and the subsequent lease of the Boston and Lowell Railroad Corporation to the Boston and Maine Railroad, and the Central Massachusetts Railroad Company, which claims that the fund in question did not pass under the terms of its lease. No claim is made by any intervening parties, and the fund belongs to the Central Massachusetts Railroad Company, unless it passed to the Boston and Maine Railroad by virtue of the leases above referred to.

At the time of the lease of the Central Massachusetts Railroad Company to the Boston and Lowell Railroad Corporation, the former corporation had no funds or securities other than the fund in controversy, and its principal or only other assets con-

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sisted of its roadbed and track partially constructed, and some rolling stock. The road has since been completed by the Boston and Lowell Railroad Corporation and the Boston and Maine Railroad, and is now in active operation. If the fund in question passed to the Boston and Lowell Railroad Corporation under the terms of this lease, it is admitted that it passed from that corporation to the Boston and Maine Railroad.

S. Lincoln, (*H. W. Ogden* with him,) for the Boston and Maine Railroad.

G. W. Morse & C. H. Innes, for the Central Massachusetts Railroad and the committee of the bondholders.

BARKER, J. The claim of the Massachusetts Central Railroad Company under the alleged right and authorization of the committee of the bondholders cannot be sustained. The twenty thousand dollars which was the source of the fund was paid into court by a purchasing committee, and was received by the original trustees on account of the purchase price of mortgaged property sold by them as vendors under a power of sale, at a foreclosure sale which was affirmed by a final decree declaring the mortgage foreclosed. When the money was so paid and received as a part of the purchase price it became the property of the mortgage trustees, and there is nothing in the agreed statement of facts which requires a finding or a ruling that the sum so paid, or any part of it, afterward reverted to the committee.

The sale was part of a scheme for the reorganization of the Massachusetts Central Railroad Company, which then had an unfinished railroad, mortgaged to the trustees to secure an issue of bonds, the interest upon which was then overdue, and the committee was acting for the holders of a portion of the bonds under a memorandum dated January 20, 1883, and also under the provisions of St. 1883, c. 64, by which they were empowered to purchase the mortgaged property upon foreclosure sale, and to hold it in trust for the bondholders, but absolutely in fee, and free from every right and equity of redemption of the mortgagor. At the time of the sale all of the bondholders had not come into the scheme, and the whole debt represented by the bonds and coupons was not brought in until the year 1895. The trustees had to rely upon the proceeds of the sale to reimburse themselves for the expenses of the sale, and also to discharge

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the obligations of their trust to such bondholders as should not consent to extinguish their bonds by taking preferred stock in the reorganized company. The purchase price at the sale was $500,000, of which the $20,000 only was paid in cash.

If the whole mortgage debt had been represented by the committee at the time of the sale, and there had been some fund other than the purchase price out of which the expenses of the mortgage trustees could be paid, the purchasers at the sale might have paid into court a sum to secure the completion of the reorganization, and to be returned to them upon the extinguishment of the mortgage debt by the issue to the bondholders of preferred stock in the reorganized corporation. But the real situation at the time of the sale required the offer of a substantial price, which would enable the mortgage trustees to discharge their obligations in respect to that part of the mortgage debt whose holders had not then agreed, and might not agree, to surrender it for preferred stock. So the committee bought for the price of $500,000, and paid the $20,000 as a part of that price, and the mortgage trustees received the part paid in cash, not as a pledge or as collateral, but as an asset of their trust. That the committee did not pay the balance of the purchase money, and that the whole mortgage debt has since been extinguished, do not cause that part of the purchase money which was in fact paid to revert to the purchaser. The committee released to the new corporation, on November 24, 1886, the property which they had bought at the foreclosure sale in May, 1883. The reason why this fund remained untouched after deducting the expenses of the foreclosure sale was no doubt the fact that, until the last of the mortgage debt was obtained and cancelled in 1895, the fund was held primarily in trust to pay that debt. If the mortgage debt should be wholly extinguished without recourse to the fund, the fund would go to the mortgagor or its successors or assigns; the right to the fund subject to the prior rights of the holders of the mortgage debt being as of course in the mortgagor. But by the reorganization which was authorized by St. 1883, c. 64, and was completed before the committee's release of November 24, 1886, the Central Massachusetts Railroad Company had become the legal successor of the mortgagor, and so was the owner of the beneficial interest

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in this fund, subject only to the prior claims of the holders of so much of the mortgage debt as had not then been extinguished. The bondholders' committee were never the full successors of the mortgagor, either before their purchase or after becoming by means of the purchase the trustees to hold in fee the title to all the property which they had purchased; but the reorganized corporation is such a successor, and it obtained its title to the fund, not through the sale, but from the mortgagor through the reorganization.

The remaining question is whether the right which the Central Massachusetts Railroad Company had in the fund on December 7, 1886, passed to its lessee under the demise contained in the indenture of that date. Whether the original trustees were then living does not appear, but the fund was then deposited in their names as trustees under the mortgage in the bank in which it yet remains. The first claim upon it at that time was a portion of the mortgage debt spoken of in the agreed statement as "coupons to the amount of some $150,000," which are also said to have been in litigation until 1895, when they were all obtained and cancelled. It is therefore plain that at the time of the indenture the lessor's right in this fund was not money or cash, but was an equitable right the value of which was wholly contingent and uncertain, which would not probably be reduced into money payable to the lessor, if at all, until the whole mortgage debt should be otherwise extinguished.

The demising clause of the indenture is as follows: "Lease of all property. The lessor doth hereby grant, demise, and lease unto the lessee its railroad and railroad property of every description, both as the same now exists and it shall exist after the location, construction, completion, and equipment of said railroad from North Cambridge to Northampton as herein provided, and the location, construction, and equipment of said branch or extension of said railroad as above specified, including therein its railroad, lands, and all real estate, rights, and appurtenances connected therewith, within this Commonwealth; also all branches, tracks, side tracks, and the land on which the same are located, roadbeds, superstructure, gravel pits, station-houses, depots, viaducts, bridges, piers, wharves, shops, buildings, fixtures, water tanks, engines, tools, cars, rolling stock, machinery, furniture,

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telegraph apparatus, poles, and equipment of every kind, material and supplies, and all personal property and estate owned by said lessor; also all rights, franchises, easements, privileges, and appurtenances belonging to said lessor in connection with said railroad, together with the right to fix, demand, and receive all tolls, rent, revenue, income, and profits of the demised railroad and premises, and the right to run, manage, and control the same, subject to the provisions of its charter and of the laws of this Commonwealth."

While the whole indenture, with the situation of the parties and the circumstances under which the indenture was entered into by them, is to be taken into account in construing the demising clause, the language of that clause itself is the first and principal subject of consideration. After the words, "The lessor doth hereby grant, demise, and lease unto the lessee," the clause contains three co-ordinate sub-clauses, the second and third of which begin with the words "also all." The first designates as demised the lessor's railroad and railroad property of every description, both as it then existed and as it should exist after the contemplated completion and equipment of the railroad and its branch or extension by the lessee. The second designates as demised also many particular classes of things, some of which would clearly be parts of or included in the railroad property already designated, and others of which as "furniture," "material," and "supplies," might not be railroad property in any sense other than that they would be owned by a railroad company, and this sub-clause ends with the words, "and all personal property and estate owned by said lessor." The third sub-clause designates as demised also all rights, franchises, easements, privileges, and appurtenances belonging to the lessor in connection with said railroad, together with the right to take tolls, rent, revenue, income, and profits, and the right to operate the railroad.

The construction for which the appellant contends is that the words, "and all personal property and estate owned by said lessor," are not part of a clause designating additional subjects of the demise, and that they are governed by the prior word "including," and should be restricted so as to include only such property, not already specified, as is in its nature distinctively

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railroad property. But the whole clause as it stands does not seem to us to bear this interpretation. We think the words, "including therein its railroad, lands, and all real estate, rights, and appurtenances connected therewith, within this Commonwealth," are the end of one distinct part of the whole clause, and that the words which follow relate back directly to the words "grant, demise, and lease," and that the things described and designated in this clause are demised simply by force of being named therein, and not as included in something previously demised, and in the same way in which the franchises and the rights to tolls and to operate the railroad and the other rights designated in the third sub-clause are treated as distinct subjects of the demise, although some of them would have passed to the lessee as appurtenant to the demise of the railroad and its lands and real estate. That there is repetition in the different sub-clauses does not tend to show that the only office of the language of the second or the third clause is more clearly to designate what was meant to be covered by the first. We think that as it is written the whole demising clause was intended to demise all of the lessor's property and rights which were fairly included in the language of any part of the clause.

Such a right as that of the lessor to the fund in question was clearly personal property owned by the lessor, since the word "property" extends to every species of valuable right and interest. *Boston & Lowell Railroad* v. *Salem & Lowell Railroad*, 2 Gray, 1, 85. *Williston Seminary* v. *County Commissioners*, 147 Mass. 427, 430.

This meaning of the demising clause will stand as its true construction, unless the other parts of the indenture taken with the situation and circumstances of the parties show that it is untenable, and that it could not have been the intention of the parties. After considering all that has been urged by the appellant in this connection, we are not convinced that the parties did not intend that the right of the lessor to this fund should pass by the demise. The indenture was much more than a mere lease. It was part of an arrangement by which the lessor's railroad should be completed and equipped by the lessee, and operated by it until the expiration of ninety-nine years, and by

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which also the lessor's debts of $250,000 in certificates of indebtedness held by the lessee, and the lessor's other debts and liabilities not exceeding $150,000 in amount, should be extinguished by the lessee, out of the two million of bonds at par which the lessee purchased of the lessor, and the balance of which was to go to the completion and the equipment of the railroad.

It is true that the lessor's debts outside of the certificate of indebtedness might exceed the sum of $150,000, but it does not appear that they did exceed that sum, and it is also clear that, if they did exceed it, there was no probability that the lessor's interest in this fund would be available in season to be applied upon the excess, which must be at once paid off in order to make the new mortgage a first lien. The position in which the lessor was placing itself was one in which its only business would be to make such contracts as the lessee should approve, and after the completion of the road keep up its corporate organization at the expense of the lessee, and apply to its own use the rental which it should receive. The omission of both parties to make the inventory of demised property for which the indenture called has no bearing upon the present question. While there are a number of expressions in the indenture which would not have been used if the only property demised were this right and similar rights, there are none which are specially significant when it is once admitted that this right with other property of many different kinds was demised. It was of course so improbable that the right would continue as an unadjusted equitable claim for ninety-nine years, that the parties could not have meant that it should be returned to the lessor in like good order and condition as when demised, using that phrase literally. But the phrase is in substance suitable enough to do justice between the lessor and the lessee with respect to the right leased, and is used appropriately and comprehensively with reference to all the demised property as a whole. If the right had been to an ascertained balance of money due and payable by the trustees, the parties might or might not have included it in the demise, and if they did include it they would probably have made some express stipulation as to its application by the lessee, and very likely as to

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interest and to repayment at the end of the term. But it was not money or likely to be the means of causing any speedy payment of money, and was perhaps of no value whatever, and therefore the absence of any clause in the indenture having special relation to the treatment of the right or of its proceeds is not significant. The rent reserved was not fixed by the income of the demised property, but by the gross receipts from the operation of the railroad, and the clauses about taking possession raise no argument that this right did not pass, any more than they would an argument that any incorporeal right did not pass.

We consider that it is useless to distinguish from the present case the numerous cases cited by the appellant in which broad general terms like the word "property" have been construed as restricted in meaning by the other portions of the instruments in which they appear, as each such case must stand mainly upon its own peculiar circumstances. *Decree affirmed.*

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CONSOLIDATED HAND-METHOD LASTING MACHINE COMPANY *vs.* ARTHUR I. BRADLEY & another.

Suffolk. January 10, 11, 1898. — May 19, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Notice to defend Action — Liability of a Person to one against whom Judgment has been recovered — Employers' Liability Act.

Where a defendant proposes to look to a person who is liable to recompense him if he should be beaten in an action, the notice, in order to make the judgment binding on that person, must be such in substance as to give the person notified information that he is called upon to come in and defend the action, or that he is given an opportunity so to do, and that if he does not defend it he will be held responsible for the result.

Where a defendant, the lessee of a building, defends against some negligence of his own, or of some person for whom he is made liable by the employers' liability act, St. 1887, c. 270, and damages are assessed with reference to the degree of culpability of himself or of such person, he has not a right of action against his lessor to recover the amount of the judgment, but the lessor, if liable at all to him, is liable at common law for the breach of his contract or of his duty.

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CONTRACT, to recover the amount of a judgment paid by the plaintiff in an action brought against it, together with counsel fees and costs incurred in defending. At the trial in the Superior Court, before *Dewey*, J., the jury returned a verdict for the plaintiff; and the defendants alleged exceptions, which appear in the opinion.

A. M. Lyman, (*C. C. Barton & C. C. Barton, Jr.*, with him,) for the defendants.

A. A. Strout & G. S. Selfridge, for the plaintiff.

FIELD, C. J. Rose Tierney and John Tierney, the next of kin of John M. Tierney, an employee of the plaintiff in the suit at bar, brought suit against the plaintiff under St. 1887, c. 270, § 2, in which they alleged in the first count that John M. Tierney was instantly killed from injuries received by reason of a defect in the ways, works, and machinery of the plaintiff, which had not been discovered or remedied, owing to the negligence of a person in the employ of the plaintiff and intrusted with the duty of seeing that the ways, works, and machinery were in proper condition. In the second count, they alleged that said John M. Tierney sustained bodily injuries from which he died without conscious suffering, by reason of the negligence of a person in the service of the plaintiff intrusted with and exercising superintendence, whose sole and principal duty was that of superintendence. The specific cause of the injury which resulted in the death of John M. Tierney was alleged in the first count to be the defective condition of an electric lamp and of an electric current. The next of kin amended their declaration by adding a third count, which, so far as material to the present suit, did not differ from the first count. The present plaintiff, the defendant in that suit, answered by a general denial, and on the trial the jury found for the plaintiffs and assessed damages in the sum of $3,000. The defendant in that suit filed exceptions and a motion for a new trial. A new trial was ordered, unless, the exceptions being waived, the plaintiffs therein would remit $1,500 from the amount of the verdict. The plaintiffs remitted that sum, and judgment was entered for $1,500 damages, and the costs of suit, which the defendant in that suit paid.

The suit at bar was brought by the defendant in that suit

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against the present defendants, to recover the amount of that judgment and the costs and counsel fees incurred in the defence of that suit. Before the trial of the original suit the present plaintiff gave to the defendants the following notice.

"Boston, Mass., May 31, 1893. Messrs. Bradley & Woodruff, 234 Congress St., Boston, Mass. Dear Sir: The suit of *Tierney* v. *Consolidated Hand-Method Lasting Machine Company* for the death of John Tierney, January 1, 1891, when he was killed, the result of touching or holding the electric light apparatus in the room occupied by the Machine Company, where the electricity was furnished by you, will come on for trial on Monday next, in the second session of the Superior Court. We hope and expect to be able to win the case and thus relieve the parties from liability. In case, however, we should be beaten, we shall look to you to recompense the Machine Company; and we shall expect you to assist in the conduct of the defence of the case. Yours truly, Strout & Coolidge, Attorneys for C. H. M. L. Machine Co."

The exceptions in the present case recite: "The defendants were not consulted as to the manner in which the defence [of the original suit] should be conducted, although they were present at the trial." It appears also that the exceptions in the original suit were waived without the knowledge or consent of the present defendants.

The substantial ground of the liability of the present defendants as alleged is, that the defendants agreed with the plaintiff to furnish electricity by suitable appliances for the purpose of lighting the premises occupied by the plaintiff, and to keep the appliances in safe condition; that the electricity was furnished by two currents under the control of the defendants; that the appliances were out of repair and dangerous, of which the defendants had notice, and that the defendants promised to shut off the stronger of the two currents, which they failed to do, in consequence of which Tierney, one of the plaintiff's employees, was killed by taking hold of an electric lamp. Each count sets out the bringing of the original suit, (misdescribing it as a suit by the administrator of the estate of Tierney,) the judgment therein, and the costs and expenses which the plaintiff had paid, and alleges notice to the present defendants to come

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in and defend the original suit, and that they neglected to do so, whereupon the present plaintiff defended it.

The jury in the present suit rendered a verdict for the plaintiff, and assessed damages to the amount of the judgment in the original suit, and of the sum expended for costs and for counsel fees therein, with interest.

In the trial of the present suit the defendants made twenty-two requests for instructions, which, with the exception of the fifth and sixth requests, were not given otherwise than as appears in the charge of the presiding justice. The eighteenth and nineteenth requests were as follows:

"18. The notice dated May 31, 1893, was given too late, and was insufficient in form and substance to bind these defendants.

"19. These defendants are not bound by the amount of the judgment recovered against the plaintiff by Tierney."

Many of the other requests proceed on the ground that the plaintiffs in the original suit, being the next of kin of John M. Tierney, had no cause of action against the present defendants; that they recovered judgment against the present plaintiff on the ground of the negligence of the plaintiff, or of some person in its service intrusted with the duty of seeing that its ways, works, and machinery were in proper condition, or intrusted with and exercising superintendence, and that there can be no contribution between wrongdoers. In the original suit the damages to be recovered by the terms of the statute were to be "not less than five hundred and not more than five thousand dollars, to be assessed with reference to the degree of culpability of the employer herein or the person for whose negligence he is made liable." St. 1887, c. 270, § 3.

Upon the question of the notice to come in and defend the original suit, the presiding justice charged the jury as follows:

"There is evidence that the defendants were notified of that suit and had an opportunity to come in and defend, and I do not know that any question is made about that notice. If there is, the plaintiffs must satisfy you that that notice was given at a reasonable time, so that the defendants had a reasonable opportunity to avail themselves of their knowledge, to furnish evidence, and to take part in the trial, and to do whatever was reasonable and lawful to defend their interests. The binding force of the

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judgment grows out of the fact that such notice has been given and such opportunity afforded to the defendants. I do not understand that any question is made here about the terms of the notice not being sufficiently particular; I did not hear it read but once and I have not seen it, but it does not strike me that there was any material defect in the form of the notice; whether it was given in time or not, sufficient time, is for you to determine, if there is any question made about it.

"If the notice was seasonably given, and if there is this liability over on the part of the defendants, then that suit settles three things.

"It settles, in the first place, the right of the plaintiff to recover in that action; in other words, that Mr. Tierney was not guilty of any carelessness, that there was nothing in his conduct why he should not recover.

"It settles another proposition, another fact, and that is, that the premises of the present plaintiffs, this room, this lamp in connection with the electricity running it, was in a defective condition.

"And it settles the third thing, and that is the amount of damages which the plaintiff in that action was entitled to.

"So the parties in this suit, if the other steps were properly taken, the defendants in this suit, cannot contest the question of Mr. Tierney's right to recover, nor the question whether the lamp was defective or not, nor the question of the amount of damages."

The exceptions also recite: "At the close of the charge the defendants' counsel specifically excepted to the refusal of the court to give the rulings requested, save rulings five and six, which were given, whereupon the court said to the counsel for the plaintiff: 'Counsel on the other side are excepting to my refusal to give all their requests. . . . Whether you care to look them over and have some of them given, I do not know.'" And the counsel replied that "he would trust the court."

We are of opinion that the notice is not sufficient in form to make the judgment in the original suit conclusive upon the present defendants as to the amount to be recovered, if anything is to be recovered, and that the exceptions to the refusal of the presiding justice to give the eighteenth and nineteenth requests are

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open to the defendants, although the presiding justice, relying upon the counsel of the plaintiff, seems not to have examined carefully the form of the notice. The notice given implies that the counsel of the defendant in the original suit, the present plaintiff, intended to retain the control of the defence of that suit. The counsel might well doubt whether this suit was one which the present defendants were required to defend. They gave the present defendants notice that they should look to them to recompense the present plaintiff if it should be beaten in that suit, and that they should expect the present defendants to assist in the conduct of the defence, but they did not offer to surrender the control of the defence. Whatever may be the form of such a notice, we think that, under the circumstances in which it is given, it should call upon the person notified to come in and defend the suit, or should offer him an opportunity of doing so. The party notifying cannot insist upon retaining control of the defence, and yet hold the party notified bound by the result of the suit. The decisions of different courts in this country are not uniform upon the requirements of such a notice, but the weight of authority in this Commonwealth is that the notice must be such in substance as to give the person notified information that he is called upon to come in and defend the suit, or that he is given an opportunity to do so, and that if he does not defend it he will be held responsible for the result. *Milford* v. *Holbrook*, 9 Allen, 17. *Chamberlain* v. *Preble*, 11 Allen, 370. *Elliott* v. *Hayden*, 104 Mass. 180. *Gray* v. *Boston Gas Light Co.* 114 Mass. 149, 155. *Boyle* v. *Edwards*, 114 Mass. 373. *Westfield* v. *Mayo*, 122 Mass. 100, 109. *Richmond* v. *Ames*, 164 Mass. 467, 474; *S. C.* 167 Mass. 265. Freem. Judgments, (3d ed.) § 181. 7 Robinson's Practice, 150–152. Black, Judgments, §§ 567 *et seq.*

Boston v. *Worthington*, 10 Gray, 496, is the case in our reports most favorable to the plaintiff, but we think that decision goes to the very verge of the law on the subject, and in the opinion it is said: "The defendants, by the notice given to them of Southwick's action, had an opportunity to defend it, and the case shows that they 'were present at the trial, and testified therein.'" In the present case we think that the notice on its face shows that it was not the intention that the present defendants should

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have an opportunity of controlling the defence of the original suit.

We are also of opinion that the original action was such that by any form of notice the present defendants could not necessarily, as matter of law, be held bound by the judgment in that action. The damages in that action were assessed with reference to the degree of culpability of the defendant therein, or of some person for whose negligence the defendant was made liable by St. 1887, c. 270. The defendants in the present suit, if they are liable at all to the plaintiff, are liable at common law for the breach of their contract or of their duty. The defendant in the original action was defending against its own negligence or the negligence of persons for whom it was responsible.

In *Westfield* v. *Mayo*, 122 Mass. 100, 109, the principle is stated as follows: "It is simply this: If a party is obliged to defend against the act of another, against whom he has a remedy over, and defends solely and exclusively the act of such other party, and is compelled to defend no misfeasance of his own, he may notify such party of the pendency of the suit and may call upon him to defend it; if he fails to defend, then, if liable over, he is liable not only for the amount of damages recovered, but for all reasonable and necessary expenses incurred in such defence." It is also said in the opinion in that case: "In the present case, the plaintiff was not compelled to incur the counsel fees by reason of any misfeasance, or of any contract of its own, but was made immediately liable by reason of the wrongdoing of the defendant. There seems therefore to be no ground, in principle, by which it should be precluded from recovering as a part of its damages the expenses reasonably and properly incurred in consequence of the wrongdoing of the defendant. Within this rule a master, who is immediately responsible for the wrongful acts of a servant, though there is no misfeasance on his part, might recover against such servant not only the amount of the judgment recovered against him, but his reasonable expenses including counsel fees, if notified to defend the suit. It may be said in that case, as in this, that there may be a technical misfeasance, or rather nonfeasance, in not guarding more carefully the conduct of the servant, or in watching for obstructions in the street; but no negligence is necessary to be proved in either case as

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matter of fact; the party is directly liable because of the wrong of another, whatever diligence he may have himself exercised. It does not, however, apply to cases where one is defending his own wrong or his own contract, although another may be responsible to him." See *Gray* v. *Boston Gas Light Co.* 114 Mass. 149; *Lowell* v. *Boston & Lowell Railroad*, 23 Pick. 24.

The charge of the presiding justice in the case at bar puts the liability of the defendants, if they were liable, upon the facts, if they were proved, that the defendants undertook with the plaintiff to see to it that the electrical apparatus was kept in proper condition; that it was out of repair, of which the defendants had notice; that the defendants promised to repair it in a proper manner, and meanwhile to keep things safe, and to see to it that the large current of electricity from the works of the city should not be turned on, all of which the defendants failed to do; that, induced by these promises, the plaintiff permitted its employees to continue at work; or that, if the defendants repaired the apparatus, the repairs were negligently and improperly made, and that the lamp which exploded was in a dangerous condition.

The liability of the defendants cannot be put upon the ground that they were liable to the next of kin of Tierney, and that they had been released from this liability by the judgment against the plaintiff and the satisfaction of it, because the defendants were not liable at all to the next of kin of Tierney. If the defendants promised the plaintiff to keep the electrical apparatus in repair and failed to do so, they may be liable to the plaintiff for the breach of this promise; if they undertook to repair it and repaired it negligently, in consequence of which the plaintiff suffered damage, they may be liable for this negligence. If the present plaintiff was held liable in the original suit to the next of kin of Tierney on the ground of some negligence of its own, and if the extent of its liability was determined within certain limits by the degree of culpability of the plaintiff, or of some person for whose negligence it is made liable by St. 1887, c. 270, then it could not be held that necessarily, as matter of law, the present defendants are liable to reimburse the present plaintiff to the extent of the judgment recovered against it in the original suit, even if the present defendants had been properly notified to come in and defend that suit. The reason is that the

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defendant in the original suit was compelled to defend against some negligence of its own, or of some person for whom it was made liable by the statute, and the damages were assessed with reference to the degree of culpability of itself or of such person. It does not follow from this that the plaintiff is unable to maintain the present suit for breach of contract or for negligence on the part of the defendants whereby it has suffered damage. See *Old Colony Railroad* v. *Slavens*, 148 Mass. 363; *Toomey* v. *Donovan*, 158 Mass. 232. But how far, if at all, the defendants can be held liable for the damages which the present plaintiff was compelled to pay, or did pay, to the next of kin of Tierney, we are not called upon now to determine.

Exceptions sustained.

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NEW ENGLAND RAILROAD COMPANY *vs.* BOARD OF RAILROAD COMMISSIONERS.

Suffolk. January 12, 1898. — May 19, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Widening of a Way at a Crossing — Town — Railroad — Statute — Constitutional Law.

The contention that a widening of a way is not included within the meaning of the words "alteration . . . in . . . the location of . . . the highway or town way," in Pub. Sts. c. 112, § 129, or of the words "that the location . . . of the highway or town way shall be changed," in § 130, so that the statute does not authorize an alteration of the crossing to be effected by widening the way at the crossing, or, if it does authorize such a widening, that it does not provide compensation for land taken for a widening, and is unconstitutional, is unsound, and cannot avail.

PETITION, filed December 10, 1896, for a writ of certiorari to quash certain proceedings of the respondent.

The petition alleged that, on April 3, 1896, the selectmen of the town of Blackstone filed a petition with the board of county commissioners of the county of Worcester, wherein they recited that St. Paul Street in said town was crossed by the location of the New England Railroad Company, and also by the location of the Providence and Worcester Railroad Company, not at

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grade in either case, but by separate bridges passing above St. Paul Street, and praying that said street might be widened, and alterations made in the bridges by lengthening the same and moving back the abutments thereof.

After a hearing, the board, on July 14, 1896, made a return, granting in part the prayer of the petitioners; and the petitioner in the present case appealed to the Board of Railroad Commissioners, stating as reasons therefor, "first, that said alterations are not required by public convenience or necessity; secondly, that the expense of such alterations would be disproportionate to any advantage to be gained thereby; thirdly, that if any considerable proportion of said expense should be put upon your petitioners, it will be an expense not warranted by its financial condition; fourthly, that the manner and limits in which the work should be done, as prescribed by the commissioners, is unnecessarily expensive, even if the alterations are necessary to be made."

At the hearing before the board, it appeared that, before the laying out of either of the railroads, all the land covered by and in the vicinity of the two crossings of St. Paul Street was in the possession of one owner, and that no highway or other way existed where St. Paul Street now is. About 1846 this owner sold to the Providence and Worcester Railroad a strip forming its present location over the present St. Paul Street, being south of and adjoining the location of the petitioner. The grantor reserved in his deed a private way twenty feet wide. In 1847 the owner sold the Norfolk County Railroad Company, a predecessor of the New England Railroad Company, the strip forming its present location over the present St. Paul Street. In the deed no way was reserved. When the Norfolk County Railroad was constructed, however, a space twenty feet wide was left open through the raised bank or "fill" over which the railroad was built at that point, this space being continuous with the private way reserved under the deed to the Providence and Worcester Railroad. At this point there was no public way until the year 1869, when the present St. Paul Street was laid out as a town way twenty feet wide at the point in question, where it passed under the railroad bridge of the petitioner. In other words, St. Paul Street was laid out of such width as to

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include all of the land contained in the abutments of the railroad bridge, and no more. There was no change in the situation, with reference to St. Paul Street or the railroad bridge, from the time of the laying out to the present date, and the petition of the selectmen of Blackstone was for the widening of said street so as to include the land now occupied by the northerly abutment of the bridge passing over the street.

The petitioner requested the board to rule, as matter of law, that it was not competent for it to order the widening of St. Paul Street as prayed for.

The board refused so to rule, and ordered in writing that St. Paul Street be widened on the northerly side thereof, and that the northerly abutments of the railroad bridge be set back a distance of thirteen feet, and that the bridge be lengthened so as to conform to the widening of the street.

The respondent demurred to the petition, on the ground that it did not set forth any legal cause for granting its prayer.

Hearing before *Knowlton*, J., who, at the request of the parties, reserved the case on the petition and demurrer for the consideration of the full court.

F. A. Farnham, for the petitioner.

F. N. Thayer, for the respondent.

BARKER, J. The plain purpose of Pub. Sts. c. 112, § 129, is to give a method of making any alteration in the crossing of a railroad and a way for ordinary travel which may be necessary for either the safety or the convenience of the public. The alteration may be in the crossing itself, in the approaches thereto, or in the location of the railroad or the way for ordinary travel. If the taking of land for the purposes of making the alteration is necessary, the statute (Pub. Sts. c. 112, § 130) provides how it shall be taken and how the damages for the taking shall be assessed and paid. The petitioner's argument is that a widening of a way is not included within the meaning of the words "alteration . . . in . . . the location of . . . the highway or town way," in § 129, or of the words "that the location . . . of the highway or town way shall be changed," in § 130, and so that the statute does not authorize an alteration of the crossing to be effected by widening the way at the crossing, or, if it does authorize such a widening, that it does not provide compensation

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for land taken for a widening, and is unconstitutional. It is to be noticed that none of these contentions are made in the statement of the reasons of appeal.

The widening of an existing way is a change in its location, effected by bringing more of the earth's surface within the location. Such a change is contemplated both in § 129 and in § 130. That the intention of the Legislature was to provide for any alteration necessary for the public safety or convenience is apparent from a comparison of the provisions of Pub. Sts. c. 112, §§ 129, 130, with that of St. 1872, c. 262, and of St. 1874, c. 305, and with the decisions of this court in *Lancaster* v. *County Commissioners*, 113 Mass. 100, and *Boston & Albany Railroad* v. *County Commissioners*, 116 Mass. 73, 79. As the statute provides for compensation if land is taken, there is no ground for contending that it is unconstitutional. Pub. Sts. c. 112, § 130.

Demurrer sustained, and petition for certiorari dismissed.

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HARRY J. JAQUITH *vs.* SELECTMEN OF WELLESLEY.

Suffolk. January 14, 1898. — May 19, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Mandamus — Statute — Appointment of Registrars of Voters from the Two leading Political Parties.

The only test given in St. 1893, c. 417, as to the appointment of registrars of voters from the two political parties which at the next preceding State election were the two leading political parties is, that the registrar shall act with that one of the leading political parties which he was appointed to represent; and it is not required that he shall be recognized as in regular standing by, or shall in all things act with, the predominant faction or division of that leading political party.

PETITION for a writ of mandamus commanding the selectmen of the town of Wellesley to remove one John H. Sheridan from his office as registrar of voters in said town, and inasmuch as one Beebe and one Kingsbury, town clerk, members of the board, were representatives of the first leading political party

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at the last State election, that the selectmen be directed to appoint two members of the second political party at the last State election to the vacancies now existing and so created. Hearing before *Knowlton*, J., who dismissed the petition, and the petitioner alleged exceptions, in substance as follows.

The petitioner on May 10, 1897, filed a written complaint with the selectmen of Wellesley, under St. 1893, c. 417, §§ 28, 29, and 30, stating that one John H. Sheridan, who, on April 21, 1897, had been reappointed a registrar of voters to represent the Democratic party by the selectmen of Wellesley, had ceased to act with said party, and requesting his removal. On June 4, the Democratic town committee of Wellesley voted that Sheridan had ceased to represent that party, because he "bolted the nominations of that party at the last State election." On June 22, a hearing was had before the selectmen, and the foregoing vote was put in evidence, together with oral evidence showing that Sheridan had admitted that he did not support the money plank of the Chicago platform, nor the planks referring to the Supreme Court and Federal judges, and had said that he had voted the Gold Democratic ticket at said election. At the hearing, the selectmen ruled that Sheridan need not answer questions asking him what ticket he supported at the polls at the State and national election, and that the petitioner could not go into that question. Sheridan testified that he had always acted with the Democrats, but did not deny any of the foregoing evidence. The selectmen decided that it was not shown that Sheridan and another registrar (who died after the decision) had ceased to act with the Democratic party, and declined to remove them.

The petition in this case alleged that the selectmen acted at the hearing with the wilful intent to defeat the purpose of the law, in excluding evidence offered in support of the complaint and that their decision was wilful, and in bad faith and in defiance of the provisions of the statute. None of the evidence tended to show that these allegations were true, and two of the three selectmen, being called as witnesses by the petitioner, testified that they acted in good faith and according to their best judgment.

At the hearing the above facts were put in evidence, and Sheridan admitted that he did vote for the candidates known as

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the Gold Democratic candidates at the last election, and did not support the financial and other planks of the Chicago platform. He then testified that he intended to support the Democratic party at the polls on the next election. The respondents also testified, in their own behalf, that they did not know when they appointed him, nor at the hearing before them, how Sheridan had voted at the previous election, but made their decision in good faith, giving as the only reason for their finding that Sheridan had always been a Democrat.

At the close of the evidence the petitioner requested the court to give the following rulings:

"1. If the court shall find that the Democratic town committee of Wellesley had declared by vote that Sheridan was no longer a member of that party prior to the hearing before the selectmen for his removal, and that said vote was put in evidence at the hearing, then the court is bound as matter of law to grant the relief prayed for.

"2. If the court shall find that Sheridan did not vote for the candidates for Governor and Presidential Electors of the Democratic party, so named on the official ballot, at the State and national election of 1896, then the court is bound as matter of law to grant the relief prayed for.

"3. If the court shall find that Sheridan did not support the financial principles declared in the platform of the Democratic party, so named on the official ballot, during the State and national campaign of 1896, then the court is bound as matter of law to grant the relief prayed for.

"4. If the court shall find that Sheridan did not support the candidates for governor and presidential electors of the Democratic party, so named on the official ballot, at the State and national election of 1896, and did not support the financial principles declared in the platform of said party, then the court is bound as matter of law to grant the relief prayed for.

"5. Membership in a political party, as required by §§ 28 to 30 of St. 1893, c. 417, is to be determined by the acknowledged members of that party; and no man can lawfully be appointed to or be retained in an office as a representative of a party under said act when the acknowledged members of that party deny his membership and demand his removal.

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"6. If the selectmen of Wellesley, at the hearing for the removal of Sheridan, refused to admit competent evidence material to the issue, then the petitioner is entitled to bring this petition for a writ of mandamus."

The judge refused to give the foregoing rulings.

W. R. Bigelow, (*H. J. Jaquith* with him,) for the petitioner.

H. Albers, for the respondents.

BARKER, J. Registrars of voters must be so appointed that the members of every board of registrars shall equally, or as equally as possible, represent the two political parties which at the next preceding State election were the two leading political parties. St. 1893, c. 417, § 28. "Whenever upon written complaint . . . to the selectmen of a town, and after notice and hearing, it shall appear that a registrar of voters other than the . . . town clerk has ceased to act with the political party which he was appointed to represent, the . . . selectmen . . . shall remove such registrar from office." St. 1893, c. 417, § 29. St. 1898, c. 548, § 418.

The petitioner having made a written complaint to the respondents, the selectmen of Wellesley, that two registrars appointed to represent the Democratic party had ceased to act with that party, the respondents upon hearing the complaint decided that it was not shown that the registrars had ceased to act with the Democratic party, and declined to remove them from office. One of these two registrars having died after this decision, the petitioner now asks a writ of mandamus commanding the selectmen to remove from office the survivor of the two registrars, and to "appoint two members of the second political party at the last State election to the vacancies now existing and so created." The petition alleges that the selectmen acted at the hearing with the wilful intent to defeat the purpose of the law, in excluding evidence offered in support of the complaint, and that their decision was wilful, and in bad faith and in defiance of the provisions of the statute. The petition for mandamus has been heard and dismissed by a single justice of this court, and, the petitioner having excepted to the refusal of the single justice to give certain rulings, those exceptions have been entered and argued in the full court. The bill of exceptions purports to state all the evidence. None of it tends to

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show that the allegations of the petition which charge the selectmen with bad faith, or with acting with an intent to defeat the law, were true, and two of the three selectmen, being called as witnesses by the petitioner, testified that they acted in good faith and according to their best judgment, and we assume that it was so found by the single justice who dismissed the petition. We do not consider, and do not now decide, whether this court, under the provisions of St. 1897, c. 530, § 20, or under its jurisdiction to entertain petitions for mandamus, will at the suit of an individual issue its writ to command officers like the respondents to reverse their official action in removing or refusing to remove, or in appointing or refusing to appoint, officials like registrars of voters, when such official action has been taken after a hearing conducted in good faith, and the decision has been arrived at in good faith. Nor do we consider or decide whether a request for a writ of mandamus to compel the removal of one registrar could be joined with a request to compel the same respondents to appoint to a vacancy occasioned by death, and another vacancy to be filled by the removal for which the petitioner asks, there being nothing to show that the respondents have refused or neglected to proceed to fill the vacancies according to law.

The petitioner's requests for rulings all proceed upon the theory that the two leading political parties are to be determined only by ascertaining the political platforms upon which candidates voted for at the time of the last State election were officially nominated, ascertaining the number of votes cast at such election for the respective candidates, and designating as the two leading political parties that body of persons which adheres to all the declarations of the platform and supports all the candidates nominated upon the platform. Besides this general theory the first request assumes that a political town committee can authoritatively declare by vote that a former member of its political party is no longer such a member, and that the status of the person named in the vote is thereby conclusively determined, and is binding upon all officials and courts who may be called upon to consider the question. Under the second request it is made essential that the person who is to be counted as a member of a political party must have voted at the next preceding election.

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Without discussing these requests in detail, we are of opinion that they were all properly refused. The words "the two leading political parties" in the election laws are not used in the sense for which the petitioner contends. The purpose of the election and caucus laws is to enable those who have the elective franchise to exercise it freely and safely, and to make it certain that the will of the electors thus exercised shall be truly ascertained and given effect. It is not the purpose of these laws to enforce discipline within any political party, or to enable one division or faction of a political party to obtain or to retain control of the party organization. The history which shows that we have always had "two leading political parties" shows also that generally one or both of these leading political parties is made up of factions or divisions neither of which assents to or supports all of the declarations or candidates of the other division, while yet the members of these factions or divisions act with the leading political party to which they belong in opposing generally the declarations of political faith and the candidates of the other leading political party. For many years the two leading political parties were the Whigs and the Democrats. Then for a short interval the Native Americans or "Know-Nothings" were a leading political party. Since that time the two leading political parties have been the Republicans and the Democrats, and there never has been a time when all the members of either of those parties subscribed to all of the same declarations of principles, or supported all of the party candidates. The only test given in the particular statute now under consideration is that the registrar shall act with that one of the two leading political parties which he was appointed to represent. It is not required that he shall be recognized as in regular standing by, or shall in all things act with, the predominant faction or division of that leading political party.

Exceptions overruled.

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SCOLESTICA JURADA *vs.* CITY OF CAMBRIDGE.

Middlesex. January 17, 18, 1898. — May 19, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Eminent Domain — Witness — Evidence — Damages — Discretion of Presiding Justice — Expert.

If, at the trial of a petition for the assessment of damages for the taking of land by a city, an understanding between court and counsel is arrived at by which all inquiry as to the crops thereon, except as they are an element in the value of the land on the day of the taking, becomes immaterial, then the answer to a previous question that the witness, who was the husband of the petitioner, raised them by consent of the city after the taking, and the exception to that answer, also become immaterial.

Where, at the trial of a petition for the assessment of damages for the taking of land by a city, a person who carries on a large market garden farm in a neighboring town, who has written and lectured upon agricultural subjects, and who examined the crops standing upon the land a few days after the taking, is not offered as a witness to the value of the land taken, it is within the discretion of the presiding justice to exclude his opinion of the value of the crops as they stood upon the soil.

PETITION to the Superior Court for a jury to assess the damages for the taking by the respondent of the petitioner's land in Lincoln and Lexington, under the provisions of St. 1884, c. 256, entitled "An Act to provide a further supply of water for the city of Cambridge." At the trial, before *Mason*, C. J., the jury returned a verdict for the petitioner, and she alleged exceptions, which appear in the opinion.

E. I. Smith, for the petitioner.

G. A. A. Pevey, for the respondent.

BARKER, J. The petitioner was entitled to have awarded to her as damages the value as of May 29, 1894, of a tract of land containing somewhat more than seven acres, on which was a house and its outbuildings, almost the whole of the land being under cultivation as a market garden. During the course of the trial the counsel and the court came to an understanding that the verdict should be upon the theory that the land was taken in fee, and that the damages were the market value of the land as it was on May 29, 1894, with interest from that date. Before that understanding had been arrived at, the petitioner's husband,

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called and examined as a witness in her behalf, had been asked, upon cross-examination, whether he raised crops on the land after the taking, and, having answered that he did, was then asked whether that was done by the consent of the city. To this question the petitioner objected, and upon its allowance excepted. The answer was, "Yes."

We understand that upon the redirect examination of the same witness the discussion arose, and the understanding between court and counsel was arrived at, by which all inquiry as to the crops, except as they were an element in the value of the land on the day of the taking, became immaterial; and we think that the result is that the answer that the witness raised them by consent of the city after the taking, and the exception to that answer, then became immaterial. The evidence was thereafter addressed to the question of the market value of the land on May 29, 1894, including the buildings and the crops thereon at that date, and the charge to the jury shows that neither any consent of the city that the crops should be raised after the taking, nor any acts of the city in interfering with the crops after that date, were relied on by either party or allowed to be considered by the jury.

The other exception is to the refusal of the presiding justice to allow a witness who was not offered as a witness to the value of the land taken, but who carried on a large market garden farm in Arlington, and who had written and lectured upon agricultural subjects, and had examined the crops standing upon the land on June 12, 1894, to testify to his opinion of the value of the crops as they stood upon the soil.

We think it was within the discretion of the presiding justice to exclude this opinion. Lands devoted to market gardening are so common in Massachusetts that there is no lack of competent persons who can give an intelligent opinion as to their value. It is not necessary to resort to evidence of the value of the crops as growing crops as one element affecting the value of the land. The bill of exceptions states that duly qualified witnesses, called by both of the parties, gave estimates of the market value of the land, including the buildings and crops standing thereon at the time of the taking. While evidence of the value of an appurtenance may be admitted when its admission is necessary to

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enable the jury fairly to ascertain the value of land taken, as in *Whitman* v. *Boston & Maine Railroad*, 7 Allen, 313, 318, a presiding justice may exclude evidence offered by a witness who does not know the value of the land itself, but is competent to testify to the effect upon the value of the land of certain occurrences. *Butchers' Slaughtering & Melting Association* v. *Commonwealth*, 169 Mass. 103, 115. In such cases much must be left to the discretion of the presiding justice.

Exceptions overruled.

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ELIZABETH McCRAW *vs.* PETER D. McCRAW.

Suffolk. January 17, 1898. — May 19, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Divorce — Gross and Confirmed Habits of Intoxication — Law and Fact — Presumption of Continuation of Libellee's Habits.

Where, in a libel for divorce for gross and confirmed habits of intoxication, it appears that the libellee had contracted the habits after marriage; that he had not reformed during the year after the libellant separated from him, and that his habits continued during that year, at the end of which he went to parts unknown; that this was some five years before the hearing, and he had not been heard from since that time, save that about three years before the hearing it was rumored that he was somewhere in the West, but nothing definite was known about him, the presiding justice is at liberty, as matter of law, to draw the inference that the libellee's habits continued, if upon all the evidence he thinks that inference reasonable and proper.

LIBEL for divorce, for the cause of gross and confirmed habits of intoxication. The libellee did not appear. Trial in the Superior Court, before *Sherman*, J., who ordered the libel dismissed, and, at the request of the libellant, reported the case for the determination of this court. The facts appear in the opinion.

C. W. Cushing, for the libellant.

No counsel appeared for the libellee.

BARKER, J. It must be shown by competent proof that the gross and confirmed habits of intoxication, which Pub. Sts. c. 146, § 1, make a ground for divorce, exist when the libel is filed, and

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if they then no longer exist a divorce cannot be granted, although it is shown that such habits have existed during the coverture. *Burt* v. *Burt*, 168 Mass. 204. In the present case it was proved that the libellee had contracted gross and confirmed habits of intoxication after marriage, and that he had not reformed during the year after the libellant separated from him, and that his habits continued during that year, at the end of which he went to parts unknown. This was some five years before the hearing, and he has not been heard from since that time, save that about three years before the hearing it was rumored that he was somewhere in the West, but nothing definite was known about him.

Usually a habit which has once become gross and confirmed continues to dominate the individual who has fallen into it. One who has gross and confirmed habits of intoxication may reform himself and become temperate or abstemious, and he may be put under such enforced restraint that his habits are broken up. The ordinary experience of mankind, however, justifies the inference that a confirmed habit will continue, and, especially when such a habit has a natural tendency to weaken the will and lessen the power of self-control, we should infer its continuance, if nothing were shown to the contrary, and the inference would be reasonable. The reasonable probability, according to the results of human experience, that gross and confirmed habits of intoxication shown to exist at a given time will continue, is a fair ground for inference, which, while not conclusive, is a proper ground for conclusions in litigated matters, and in the present case would have justified the presiding judge in granting a divorce to the libellant upon the facts stated in his report.

The report states that the libellant requested him to rule, as matter of law, that the gross and confirmed habits of intoxication of the libellee, having been proved to exist as long as anything was known about him, are presumed to continue, in the absence of any evidence to the contrary, and that the judge declined so to rule, as matter of law, upon the evidence presented, and ordered the libel dismissed, and that if the refusal to rule was correct the decree dismissing the libel is to stand; otherwise, the decree is to be set aside and the case to stand for trial.

There is some doubt as to the meaning of the report, but we interpret it to mean that the learned judge ruled that the evi-

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dence before him, and the facts which the report states that he found, would not justify an inference that the libellee's habits continued up to the time of filing the libel so as to make it lawful to grant a divorce to the libellant. This we think was incorrect. As matter of law, the presiding justice was at liberty to draw the inference that the libellee's habits continued, if upon all the evidence he thought that inference reasonable and probable.

Decree dismissing the libel set aside, and case to stand for trial.

GEORGE J. TUFTS *vs.* BENJAMIN F. HANCOX & others.

Suffolk. January 17, 1898. — May 19, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Evidence — Poor Debtor — Record of Police Court.

The record of a police court may not be controlled by oral evidence.

CONTRACT, on a recognizance under Pub. Sts. c. 162, § 28, entered into after arrest on execution. At the trial in the Superior Court, before *Richardson*, J., it appeared that the breach alleged was a default of the debtor on November 21, 1896, a time fixed for his examination by the Police Court of Lynn. So much of the certified copy of the record of the proceedings in said court as is material is as follows: "September 5, 1896, 9 A. M. Debtor present at 10 A. M. By order of court, certificate not to issue. September 5, 1896. Agreement in writing to continue to November 21, 1896, and so continued to November 21, 1896, 10 A. M. November 21, 1896. Debtor defaulted at 11 A. M." The defendants, against the objection of the plaintiff, were permitted to show by parol evidence, which was admitted *de bene*, the following facts.

At 10 A. M., September 5, 1896, the debtor was present in court without his attorney of record; the creditor was not present, but at the request of the debtor, an attorney who was there trying another case for another party called the attention of the

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court to this case, and by direction of the court the clerk called the case and called the name of the creditor, and there was no response. The court thereupon ordered the clerk to record, "Certificate not to issue," and the court said to the debtor, "You are discharged, you can go." The debtor departed.

The clerk, about five to ten minutes after 10 A. M., September 5, 1896, found in his office a written agreement made on September 3, 1896, by counsel of record for the debtor and creditor, for a continuance of the case to November 21, 1896, and immediately, at the same sitting of the court, showed it to said court, who said, "The case will stand according to the agreement," and ordered the clerk to record the case continued to November 21, 1896, 10 A. M., in accordance with said agreement, which the clerk did. The attorney who acted for the debtor that day in the absence of counsel of record was then and there immediately shown said agreement, and was informed that it was the reason for the creditor's absence, and that the judge had said, "This agreement must stand"; and no objection to it was made.

Upon this evidence the defendants requested the judge to rule that the plaintiff could not maintain this action; but the judge declined so to rule, and found for the plaintiff. The judge further found that the debtor knew of the continuance to November 21, 1896, within two weeks from September 5, and reported the case for the consideration of the full court on the agreement of the parties that, if the finding for the plaintiff on such evidence as was rightly admitted was warranted, the finding was to stand; otherwise, a new trial was to be granted.

F. M. Davis, for the defendants.

A. Hemenway, for the plaintiff.

FIELD, C. J. It was not competent by oral evidence to control the record of the Police Court. *Sewall* v. *Sullivan*, 108 Mass. 355. *May* v. *Hammond*, 146 Mass. 439. *Watts* v. *Stevenson*, 169 Mass. 61.

Evidence that the debtor was discharged on September 5, 1896, tends, we think, to contradict the record that on that day the case was continued to November 21, 1896, at which time the defendant was defaulted. The words in the record, "By order of court, certificate not to issue," are meaningless unless they

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mean that the certificate prescribed by Pub. Sts. c. 162, § 40, was not to issue on September 5, 1896, and this is entirely consistent with the record of the continuance. These words cannot be held to mean that the debtor was discharged on September 5, 1896.

If the record as it stood was not true, or if it did not contain all that should have appeared of record in the Police Court, application should have been made to that court to amend it.

Judgment on the finding.

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EDWARD McMANUS *vs.* ROBERT H. STAPLES & another.

Middlesex. January 20, 1898. — May 19, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Personal Injuries — Assumption of Risk — Act of Fellow Workman — Law and Fact.

The contention of the plaintiff, in an action at common law for personal injuries, that the fact that his fellow workman held with the tongs over a forge fire a stick of frozen dualin in order to thaw it, would of itself justify the jury in finding that the fellow workman was an unsuitable person for the defendant to have in his employ, and that therefore the case should have been submitted to the jury, cannot avail, if it appears that the fellow workman was employed only as a common laborer, that the work for which he was employed had nothing to do with the handling or use of explosives, and that, while it was careless to send an ignorant common laborer to thaw out dualin, the act was not an act of the defendant or of a superintendent, but of another fellow workman, who was working in the trench with the other workmen, and was merely acting as foreman in the absence of the superintendent.

TORT, for personal injuries occasioned to the plaintiff while in the defendants' employ, by the explosion of a stick of frozen dualin held over a forge fire by one McMahon, another employee of the defendants. Trial in the Superior Court, before *Sheldon*, J., who, at the request of the defendants, directed the jury to return a verdict for the defendants; and the plaintiff alleged exceptions, which appear in the opinion.

W. S. Marshall, for the plaintiff.

F. E. Dunbar, for the defendants.

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BARKER, J. The plaintiff's contention is, that the fact that his fellow workman held with the tongs over a forge fire a stick of frozen dualin in order to thaw it would of itself justify the jury in finding that the fellow workman was an unsuitable person for the defendants to have in their employment, and that therefore his case, which was an action at common law for personal injuries, should have been submitted to the jury.

But upon the evidence the fellow workman was employed only as a common laborer, and the work for which he was employed had nothing to do with the handling or the use of explosives. His ignorance of them did not tend to show that the defendants were negligent in employing him as a common laborer, nor in putting him to work as such with the plaintiff. While it was very reckless and careless to send an ignorant common laborer to thaw out dualin, this act was not an act of the defendants, nor of their superintendent, but of another fellow workman, who was working in the trench with the other workmen, and was merely acting as foreman in the absence of the superintendent. Both of these persons, the foreman who gave the improper order, and the workman who executed it, were fellow servants with the plaintiff, and the defendants are not answerable in this common law action for the negligence of either.

The plaintiff's whole contention is that the workman who attempted to thaw the dualin over the fire was shown to be an unsuitable servant by that act, and in our opinion that is not enough to show that the defendants negligently employed him as a common laborer. Sending him to thaw the dualin was not the act of the defendants, but of another fellow workman, who it is not contended was negligently employed.

Exceptions overruled.

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THOMAS F. MCMANUS *vs.* CITY OF BOSTON.

Suffolk. January 24, 1898. — May 19, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Equity — Specific Performance — City — Vote of Street Commissioners — Statute of Frauds — Memorandum — Agency — Fraud — Facts found by Report — Unconscionable Contract.

The recorded vote of a corporation, or of a committee acting upon a subject over which the committee has power, is a sufficient memorandum within the meaning of the statute of frauds, Pub. Sts. c. 78, § 1.

It is not necessary that the memorandum should be addressed to the other party to the contract, so far as the statute of frauds, Pub. Sts. c. 78, § 1, is concerned; nor, if it was passed as an offer to the plaintiff in a bill for specific performance, or as an acceptance of his offer, is it necessary that the vote should be addressed to him.

In this case, which was a bill in equity against the city of Boston for a decree of specific performance of an agreement to purchase land of the plaintiff, the court said that the vote of the board of street commissioners to purchase the land for the city for school purposes constituted a contract of purchase, the plaintiff having signed on the same day a written agreement under seal to convey the land to the city for the sum named, of which contract to purchase the vote was a sufficient memorandum within the meaning of the statute of frauds, Pub. Sts. c. 78, § 1; and that as the price, which was considerably more than the amount paid by the plaintiff for the land not long before, he having purchased the same in anticipation of the action of the school committee and street commissioners, was not shown to be exorbitant, the contract was not shown to be unconscionable; and that the plaintiff was entitled to a decree.

BILL IN EQUITY, for specific performance of an agreement to purchase a tract of land of the plaintiff. Trial before *Holmes*, J., who reported the case for the consideration of the full court, the plaintiff to have a decree unless the report disclosed grounds for denying specific performance. The facts appear in the opinion.

R. M. Morse & S. Davis, for the plaintiff.

T. M. Babson, for the defendant.

BARKER, J. On October 27, 1896, the school committee of the city of Boston, having power, under St. 1895, c. 408, § 2, with the approval of the mayor, to designate for school purposes lands which the board of street commissioners shall thereupon take by purchase or otherwise, passed an order requesting the

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board of street commissioners to take by purchase or otherwise the land which the plaintiff by this bill seeks to compel the city to take and pay for, and this order was subsequently approved by the mayor. When the order was passed, the plaintiff was not the owner of the land. The approval of the order by the mayor took place on November 5, 1896, and on that day the plaintiff bought the land for $5,700, in anticipation of the action of the school committee and street commissioners, and shortly after offered it to the city for $9,500, saying that that was a fair price, and not disclosing what the land had cost him. On December 22, 1896, the board of street commissioners voted to purchase the land for the city of the plaintiff for school purposes, for the sum of $9,500, and on the same day the plaintiff signed a written agreement under seal to convey the land to the city for that sum. The bill alleges that the plaintiff on that day agreed in writing with the board of street commissioners to sell the land to the city for the sum of $9,500, which the city through the board agreed to pay, and the answer alleges that on that day the plaintiff offered the land to the board of street commissioners for the sum of $9,500 by the written paper of that date signed by him and above mentioned. The answer denies that there was any agreement on the part of the board of street commissioners other than that contained in its vote of December 22, 1896, which was to purchase the land of the plaintiff for $9,500. The report does not state whether or not this vote was communicated to the plaintiff. It was communicated on the day of its passage to the school committee, who, on January 4, 1897, passed an order that the sum of $9,500 be paid to the plaintiff for the land upon his giving to the city a deed satisfactory to its law department, and also passed another order transferring funds to enable the payment to be made. The plaintiff's deed not having been accepted, nor the price of the land paid to him, he brings this bill.

The answer alleges that $5,700 was the full value of the land, and that $9,500 was an exorbitant and excessive price for it. There has been no replication, and the report does not find directly whether the fair value of the land was $5,700 or $9,500. The bill alleges that the parties agreed, the plaintiff to sell, and the defendant through the board of street commissioners

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to pay, $9,500 for the land, and the answer denies that there was any agreement to sell and purchase as alleged. The report does not find whether or not there was in fact such an agreement, but states that the presiding justice ruled "that the vote only purported to be an authority to the proper hand to accept from the plaintiff a deed when made out, and information to the school committee, and that it did not purport to be addressed to the plaintiff, or to make an executory contract with him before the deed should be passed." The report further states that the defendant contended that the street commissioners were not its agents, and had no power to bind it by an executory contract, and that the plaintiff relied on the vote of December 22, 1896, as an acceptance of the offer contained in his covenant to sell, and as a sufficient memorandum under the statute of frauds. The report also states that the case was heard on the pleadings annexed, which were the bill and answer, and upon certain admissions of counsel. The admissions are not stated, but it is stated that "the only questions were the following," which we understand in substance to be:

1. Whether the vote was an acceptance of the offer contained in the plaintiff's covenant to sell.

2. Whether the vote was a sufficient memorandum under the statute of frauds.

3. Whether the vote purported to be only an authority to the proper hand to accept from the plaintiff a deed when made out, and information to the school committee.

4. Whether the vote purported to be addressed to the plaintiff.

5. Whether the vote did not purport to make a contract with the plaintiff before the deed should be passed.

6. Whether the street commissioners were the agents of the city, and whether they had power to bind the city by an executory contract if they attempted to do so.

7. Whether the facts that the plaintiff bought the land on November 5, 1896, for $5,700 in anticipation of the action of the school committee and street commissioners, and shortly after offered it to the city for $9,500, not disclosing what the land had cost him, are grounds upon which the court in its discretion should refuse a decree for specific performance.

The board of street commissioners was a department of the

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city government clothed with the duty and the power, by virtue of the provisions of St. 1895, c. 408, § 2, to take by purchase or otherwise, at the request of the school committee, such lands for school purposes as the school committee with the approval of the mayor should designate. Before the passing of the vote of December 22, 1896, the school committee had designated the plaintiff's land to be taken for school purposes, and, as we assume from the report, the plaintiff had made the offer contained in his covenant to sell. Under these circumstances the natural interpretation of the vote was that it was an acceptance of the plaintiff's offer, and this interpretation is confirmed by the subsequent action of the school committee, on January 24, 1897, ordering the purchase price of $9,500 to be paid to the plaintiff.

Whether the vote of December 22, 1896, was an acceptance of the plaintiff's offer, or was an offer to the plaintiff, it was a sufficient memorandum under the statute of frauds. The recorded vote of a corporation, or of a committee acting upon a subject over which the committee has power, is a sufficient memorandum within the meaning of the statute of frauds, Pub. Sts. c. 78, § 1. *Chase* v. *Lowell*, 7 Gray, 33. *Johnson* v. *Trinity Church Society*, 11 Allen, 123. *Tufts* v. *Plymouth Gold Mining Co.* 14 Allen, 407. *Townsend* v. *Hargraves*, 118 Mass. 325, 335. *Argus Co.* v. *Albany*, 55 N. Y. 495. *Grimes* v. *Hamilton County*, 37 Iowa, 290. *Marden* v. *Champlin*, 17 R. I. 423. Browne, St. of Frauds, § 346.

The vote of December 22, 1896, as we construe it, purports to be more than an authority to the proper hand to accept from the plaintiff a deed when made out, and information to the school committee. Under St. 1895, c. 408, § 2, it was the duty of the board of street commissioners to take the land for school purposes by purchase or otherwise. The plaintiff was the owner of the land, and he is named in the vote which is to purchase the land of him for a sum mentioned. If, as the report assumes, his offer to sell for that sum was made before the vote was passed, the vote was an acceptance of his offer, and an agreement on the part of the board to purchase the land of him, as well as an authority to accept a deed from him, and a means of information to the school committee. If the plaintiff's offer did not precede the passage of the vote, then the vote was an offer

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to him to purchase the land from him at the price named, and his covenant of the same date was an acceptance of this offer. If the vote did not purport to be addressed to the plaintiff, it was yet an act done by the board of street commissioners in pursuance of its power and in discharge of its duty to take the land by purchase or otherwise, and it was either an acceptance of the plaintiff's offer, or it was an offer to him which he could accept. It is not necessary that the memorandum should be addressed to the other party to the contract, so far as the statute of frauds is concerned; nor, if it was passed as an offer to the plaintiff, or as an acceptance of his offer, is it necessary that the vote should be addressed to him. The board which passed it had power to purchase the land of him. If his offer to sell was then before the board, the vote concluded a contract with him to purchase his land, and if his offer was not then in, the vote was itself an offer to him, and by the making of his covenant to sell the vote became part of a contract with him.

The circumstances are wholly different from those of *Dunham* v. *Boston*, 12 Allen, 375. There the vote was in form only a recommendation on the part of a board which had the disposal of the public lands, and which was under no obligation to make a disposal of them. Here the vote is in form a vote to purchase, for a sum named and of a person named, who was the owner, and it was the duty of the board which passed the vote to take the land for the defendant for school purposes by purchase or otherwise. In *Dunham* v. *Boston* the vote did not import a contract, but was merely a step which might result in a sale. So in *Edge Moor Bridge Works* v. *Bristol County*, 170 Mass. 528, the vote was but a step toward the making of an executory contract. But here the vote itself imports a contract of purchase by its own terms, and it must, we think, be construed as a binding agreement to purchase, either upon its passage if the plaintiff's offer to sell was then in, or upon the making of his covenant if that was made after the vote.

Under the provisions of St. 1895, c. 408, the board of street commissioners had the power to purchase the land for the city, and it was the duty of the board to take the land for the city by purchase or otherwise. It follows that the board was the agent of the city to make the purchase, and had power to bind the

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city by an offer to the plaintiff, and also to bind the city by accepting the plaintiff's offer to sell.

The remaining question is whether the facts that the plaintiff bought the land on November 5, 1896, for $5,700, in anticipation of the action of the school committee and street commissioners, and shortly after offered it to the city for $9,500, not disclosing what the land had cost him, should cause the court in its discretion to refuse a decree for specific performance.

These facts do not of themselves show that the contract was unreasonable or unfair or inequitable, or that it was tainted with fraud or bad faith, or that it would operate as a fraud on the public. The allegations of the answer that the full value of the land was $5,700, and that $9,500 was an exorbitant and excessive price for it, are not found by the report to be true. The circumstances stated in the report are suspicious, but are yet consistent with the fact that the price at which the board of street commissioners voted to purchase the land was a fair one, and that there was no fraud or bad faith. If the price was so exorbitant as to make the contract unconscionable, a court of equity would not decree specific performance. We should not, however, refuse to grant that relief merely because the vendor, ascertaining that a certain parcel of land would be needed for a public purpose, had had the address to purchase it at much less than its fair value, and then to sell it to the city at a fair price, through a board charged with the duty of taking it for the city by purchase or otherwise. If the price was exorbitant, the contract might well, under the circumstances, be found to be unconscionable, and one which a court of equity would not specifically enforce. As this was not proved, and as there was a contract of purchase which the city has failed to perform, we think the plaintiff is entitled to a decree.

Decree for the plaintiff.

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LORENZO H. BROCKWAY *vs.* AMERICAN EXPRESS COMPANY.

Suffolk. February 23, 1898. — May 19, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Carrier — Negligence in Transportation of Live Stock — Conflict of Laws — Lex Loci Contractus.

The general rule that contracts are to be governed as to their nature, validity, and interpretation by the law of the place where they are made, unless it clearly appears that the contracting parties had some other law in view, is applicable to contracts of common carriers for the transportation of merchandise.

At the trial of an action against an express company for negligence in the transportation of the plaintiff's horses from a point in the State of I., through several other States, to a point in this Commonwealth, there was evidence that the contract was made in the State of I., on a printed blank form in general use by the defendant, and in terms exempted the defendant from liability arising "from any fault, negligence, or carelessness, gross or otherwise, on the part of said company, its agents or servants." On the back of this contract was another one for the transportation of a custodian of the horses, containing a stipulation that "any question arising under this contract shall be determined by the law of the State of N.," in which State the alleged act of negligence occurred. *Held*, that these were separate contracts, and the stipulation of the second above quoted did not apply to the first, or indicate an intention that it should be governed by the law of N.; that evidence of the validity under the law of the State of N. of the provisions of the first contract exempting the defendant from liability, was properly excluded; and that the first contract was governed by the *lex loci contractus*.

CONTRACT, with a count in tort, for damages caused by the defendant's negligence in the transportation of the plaintiff's horses from Chicago to Boston, without giving them an opportunity for food, water, or rest.

After the former decision in this court, reported 168 Mass. 257, the case was tried in the Superior Court, before *Maynard*, J., who allowed a bill of exceptions, in substance as follows.

The defendant, which is a joint stock company, organized under the laws of the State of New York, by its agent in Chicago, made an agreement with the plaintiff's agent to transport the plaintiff's horses from Chicago to Boston. The face of the contract was as follows:

"Agreement made at Stock Yds, Chicago, the 22d day of

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Dec., 1894, between the American Express Company, and D. W. Smalley, of Boston, Mass.

"Whereas, said D. W. Smalley has this day delivered to said Company, at Stock Yds, Chicago, Ill., the following animals, value agreed at $75.00 per head: 28 horses of which he declares himself to be the owner, consigned to D. W. Smalley, at Boston, Mass., % L. H. Brockway.

"Now it is agreed, that said Company undertakes as forwarders only, to forward said property to the nearest point of destination reached by said Company. It being understood that said Company relies upon the various railroad and steamboat lines of the country for its means of forwarding property delivered to it to be forwarded, it is agreed that it shall not be liable for any damage to said property caused by the detention of any train of cars, or of any steamboat upon which said property shall be placed for transportation, nor by the neglect or refusal of any railroad company or steamboat to receive and forward the same. . . .

"In consideration of the undertaking of said Company to forward said property as above mentioned, and of the reduced rate of compensation at which said property is to be so forwarded, said shipper agrees that said Company, its agents or any railroad or transportation company or carrier over whose lines the said property may pass, shall not under any circumstances nor for any cause be liable for any injury or damage to or loss of said property, whether or not the said injury, damage, or loss happen or arise from any fault, negligence, or carelessness, gross or otherwise, on the part of said Company, its agents or servants. It being the intent of this contract that said property shall be forwarded entirely at the owner's risk.

"D. W. Smalley, Shipper. For American Express Co.,
"H. T. Manahan, Agent."

On the back of the paper was a contract which, after making elaborate provision to the end that attendants as well as owners should assume all risk of injury to person or property incident to the transportation of animals and attendants, from whatever cause arising, concluded as follows: "It is further agreed that any question arising under this contract shall be determined by the law of the State of New York."

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In pursuance of the first contract, the horses were loaded in Chicago, about five o'clock in the afternoon of Saturday, December 22, 1894, and should have reached Boston in the forenoon of the following Monday; but owing to delay in making railroad connections at Buffalo, they did not reach Boston until late in the afternoon of that day. During the journey the horses were not unloaded, nor given any opportunity for food, water, or rest, and there was testimony for the plaintiff, which was contradicted by the defendant, that the defendant's agent refused the request of the man in charge of the horses to feed and water them at Buffalo.

The plaintiff introduced in evidence decisions of the Supreme Court of Illinois holding that by the law of that State an express company is a common carrier, and as such cannot by express contract exempt itself from liability resulting from gross negligence of itself, its agents, servants, or employees, nor limit its liability for damages therefor.

The defendant offered in evidence decisions of the courts of the State of New York to show that by the law of that State the defendant was not liable; but the judge excluded the evidence, and ruled that the contract was governed by the law of Illinois.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. C. Loring & R. W. Boyden, for the defendant.

A. N. Williams, for the plaintiff.

KNOWLTON, J. The only questions in this case are whether the ruling that the contract was governed by the law of Illinois, and not by the law of New York, was correct, and whether the evidence of the law of New York was rightly excluded. In the opinion given at the former hearing of this case (see 168 Mass. 257, 258) are these words: "The contract was made in Illinois, to be performed in part in that State and in part in other States. The rights of the parties to such a contract are to be determined by the *lex loci contractus*. *Fonseca* v. *Cunard Steamship Co.* 153 Mass. 553. *Fairchild* v. *Philadelphia, Wilmington, & Baltimore Railroad*, 148 Penn. St. 527. *Hazel* v. *Chicago, Milwaukee, & St. Paul Railway*, 82 Iowa, 477." The argument of the case at its present stage has not changed the view which we thus expressed.

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The general rule that contracts are to be governed as to their nature, their validity, and their interpretation by the law of the place where they are made, unless it clearly appears that the contracting parties had some other law in view, is familiar. This rule is applicable to contracts of common carriers for the transportation of merchandise. *Dyke* v. *Erie Railway*, 45 N. Y. 113. *Fairchild* v. *Philadelphia, Wilmington, & Baltimore Railroad*, 148 Penn. St. 527. *Hazel* v. *Chicago, Milwaukee, & St. Paul Railway*, 82 Iowa, 477. *Palmer* v. *Atchison, Topeka, & Santa Fé Railroad*, 101 Cal. 187. It is contended that the facts that the defendant is a joint stock company, organized under the laws of New York, that the horses were to be carried through the State of New York as well as through a part of Illinois and through other States, and that the evidence offered would prove that one of the provisions of the contract which was invalid under the laws of Illinois would be valid under the law of New York, show an intention of the parties that the contract should be governed by the law of New York. We cannot accept this view. The contract was made upon a blank, which presumably was in general use by the defendant in the different States where it was conducting its business. The provisions relied upon by the defendant are in the printed part of the contract. Such contracts, made by parties similarly situated, have been considered by courts of high authority in this country, and they are held to be governed by the law of the place where they were made. *Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397. *McDaniel* v. *Chicago & Northwestern Railway*, 24 Iowa, 412. *Grand* v. *Livingston*, 4 App. Div. (N. Y.) 589. *Illinois Central Railroad* v. *Beebe*, 69 Ill. App. 363. *The Iowa*, 50 Fed. Rep. 561. *The Brantford City*, 29 Fed. Rep. 373. The decision in *In re Missouri Steamship Co.* 42 Ch. D. 321, is contrary to the weight of authority, and in our opinion it is not so well supported by principle as is the doctrine presented in the cases cited above.

Thus far we have considered the case in reference to the contract for the transportation of the horses, which appears on the face of the paper. On the back of the paper is a contract for the transportation of a person to accompany and take charge of the horses. This contract contains elaborate provisions, the last of which is in these words: "It is further agreed that any ques-

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tion arising under this contract shall be determined by the law of the State of New York." It is contended that this provision should be held to apply also to the agreement for the transportation of the horses; but we think it is clear that the paper contains two separate contracts which cover different subjects, although the one on the back of the paper has some relation to that on the face of it. This provision is not a part of the contract on which the plaintiff's action is founded. In *Grand* v. *Livingston*, *ubi supra*, where the contracts on the face and on the back of the paper are respectively almost identical with those in the case at bar, it was held that this provision was not a part of the contract for the transportation of the animals.

It is argued that, even if it is not a part of the contract on the face of the paper, it indicates an intention that that contract should be governed by the law of New York, and it is said that this intention should be given effect to set aside the *lex loci contractus*. But we are not of that opinion. Such a contention was expressly overruled in the case last referred to. We are of opinion that this stipulation cannot be given effect to change the rights of the parties in the present suit.

Exceptions overruled.

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ARNESSE RIOU *vs.* ROCKPORT GRANITE COMPANY.
JOSEPH LEVIQUE *vs.* SAME.

Essex. March 1, 1898. — May 19, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Personal Injuries — Negligence — Employers' Liability Act — Superintendence.

The mere act of a person employed in a quarry of fetching and putting down a can of powder preparatory to blasting in a place where it is soon afterwards overturned, so that an explosion occurs, must be regarded as an act of manual labor, and not of superintendence under the employers' liability act, St. 1887, c. 270, even if it is assumed that the act was a negligent one, and even if the principal duty of the person was that of superintendence.

TWO ACTIONS OF TORT, for personal injuries occasioned to the plaintiffs by the explosion of blasting powder spilled from a

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can which one Labelle, who was in the defendant's employ, had put down on the solid ledge on the side of the pit in the defendant's quarry, above the place where the plaintiffs were working. The can was overturned by a tag rope attached to a derrick; and the declaration was under the employers' liability act, St. 1887, c. 270.

At the trial in the Superior Court, before *Lilley*, J., the jury returned verdicts for the plaintiffs, which the judge set aside as not warranted in law; and, at the request of the parties, he reported the cases for the determination of this court. If the ruling was right, judgment was to be entered for the defendant; otherwise, judgment on the verdict for the plaintiff in each case.

J. J. Flaherty, for the plaintiffs.

J. M. B. Churchill, for the defendant.

MORTON, J. We think that there was testimony tending to show that the principal duty of Labelle was that of superintendence, though he also performed manual labor. He was called as a witness by the plaintiffs, and testified, in answer to a question put to him by the plaintiffs' counsel, that it took most of his time "telling them [the men] what to do and giving them the work"; and in reply to the question, "During the whole day did you keep run of the men and keep them at work and tell them what to do, and what not to do?" he answered, "Yes, sir." Later in the course of the trial he was recalled by the defendant, and testified that he worked about three quarters of the time with his own hands, and that during that time he was bossing the men. But the jury might have found that the earlier testimony to which we have referred described more nearly the true character of his services, and if they did so find, the finding would have warranted the conclusion that his principal duty was that of superintendence. *Reynolds* v. *Barnard*, 168 Mass. 226. But we think that the act of putting down the can of powder where he did, which is all the negligence that is relied on, hardly can be said to have been an act of superintendence on Labelle's part, even if we assume that it was negligent to leave the can where he did. There was testimony tending to show that to some extent the bosses, of whom Labelle was one, had charge of the blasting. But this may have been in their capacity as workmen possessing more skill and experience in respect to that matter

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than the other workmen. If the work of blasting was in some sense in the nature of superintendence, the mere act of fetching and putting down a can of powder preparatory to blasting could hardly be described as an act of superintendence, or as anything more than an act of manual labor on the part of Labelle. There was nothing in it involving any control over or direction to or oversight of any other workman, or requiring any skill, or distinguishing it from any other act of manual labor. When a person is employed to work with his hands, as well as to exercise superintendence, as was the case with Labelle, the line must be drawn somewhere between what are acts of superintendence and what are acts of manual labor, or all that he does must be regarded as superintendence, or as manual labor, which manifestly would be unjust. We think that in this case the act of fetching and putting down the can of powder must be regarded as an act of manual labor. *McCauley* v. *Norcross*, 155 Mass. 584. *Cashman* v. *Chase*, 156 Mass. 342. *O'Brien* v. *Rideout*, 161 Mass. 170. *Dowd* v. *Boston & Albany Railroad*, 162 Mass. 185. *O'Neil* v. *O'Leary*, 164 Mass. 387.

It is unnecessary to consider whether the plaintiffs were in the exercise of due care. *Judgment for the defendant.*

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RICHARD L. MOREY, administrator, *vs.* GLOUCESTER STREET RAILWAY COMPANY.

Essex. March 1, 1898. — May 19, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Death — Street Railway — Due Diligence — "Gross Negligence" — Statute.

An action against a street railway company, under St. 1886, c. 140, to recover damages for the death of the plaintiff's intestate, a boy eight years and one month old, whose life is alleged to have been lost by reason of the gross negligence of the motorman, while the boy himself was in the exercise of due care, cannot be maintained, if it appears that the car could be seen for a considerable distance as it was approaching, and its sound could be plainly heard; that the boy's view was unobstructed; that the railway had but a single track, and the distance from the curbstone of the narrow sidewalk to the nearest rail was only about twelve feet; and that he ran rapidly from the walk to the track in front of the car, and no reason or excuse was disclosed for his so doing.

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TORT, under St. 1886, c. 140, to recover damages for the death of the plaintiff's intestate, Thomas Raymond Austin, whose life was alleged to have been lost by reason of the gross negligence of the defendant's motorman, while he himself was in the exercise of due care.

Trial in the Superior Court before *Braley*, J., who, at the close of the evidence for the plaintiff, directed the jury, at the request of the defendant, to return a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

J. J. Flaherty, for the plaintiff.

W. I. Badger & H. W. Ogden, for the defendant.

KNOWLTON, J. There was very little if any evidence of negligence on the part of the motorman. The testimony tends to show that, at about eight o'clock in the evening of July 24, an electric car was passing along the track on Main Street in the city of Gloucester, in the central part of the city; that the street was narrow, with narrow sidewalks, and a width of only twenty-seven feet for travel with teams between the curbstones; that the railroad track was about in the middle of the street, and the car was running at about the usual rate of speed, when the plaintiff's intestate, who was eight years and one month old, and who lived with his mother in a tenement over a grocery store nearly opposite the place of the accident, was spoken to by his sister, a girl of fourteen years of age, and made to understand that she wanted him to go into the house; and that he then started quickly to run across the street, and ran out diagonally in front of the car, where he was struck and killed. The evidence tended to show that the motorman gave a cry of alarm as soon as he saw the boy running before the car, and stopped the car as soon as he could. There was some evidence that the car was going a little faster than usual, but the highest estimate of the rate of speed testified to by any witness was eight or ten miles an hour. The whole testimony tended to show that it was going slower than that.

To recover under this statute, the plaintiff was bound to prove, not only that the motorman was negligent, but that he was guilty of gross negligence, which is recognized by the statute as something more than a mere want of ordinary care. *Galbraith* v. *West End Street Railway*, 165 Mass. 572. We do not find it

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necessary to decide whether there was any evidence of gross negligence on his part, because we think that the ruling should be sustained on another ground.

The evidence was undisputed, and the fact cannot be doubted that the car could be seen for a considerable distance as it was approaching. The boy's view was unobstructed, and the sound of the coming car could be plainly heard. The railway had but a single track, and the distance from the curbstone of the narrow sidewalk to the nearest rail was only about twelve feet. According to the testimony of one of the plaintiff's witnesses, the boy "darted right out quickly, as quickly as most boys of his age are able to go; that it did not take more than a second to go the ten feet from the sidewalk to the rail; that it all happened in the twinkling of an eye." The language used by the other witnesses was similar, and there was no dispute that he ran rapidly from the walk to the track in front of the car. The evidence discloses no reason or excuse for his going, and we are of opinion that his conduct, judged by the standard of the care of boys of common prudence, was such as would generally be condemned as careless.

In its principal facts this case is similar to *Hayes* v. *Norcross*, 162 Mass. 546, where it was held that there was no evidence of due care on the part of the plaintiff, who was a much younger boy than the present plaintiff, and who ran quickly from the sidewalk and was struck by the fore legs of a horse, which was being driven at an ordinary rate of speed along the street, near the curbstone. See also *Casey* v. *Malden*, 163 Mass. 507; *Mullen* v. *Springfield Street Railway*, 164 Mass. 450.

Exceptions overruled.

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171 177

BERTHA MINERAL COMPANY *vs.* ALVIN T. MORRILL.

Suffolk. March 8, 1898. — May 19, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Contract — Agency — Evidence — Admissions.

At the trial of an action of contract for the price of goods sold to the defendant upon a verbal order given by his agent, evidence as to how the goods were directed is admissible, not only in proof of the delivery of the goods, but, in connection with the bill for the goods and the correspondence of the parties, as an admission by the defendant.

At the trial of an action for the price of goods sold to the defendant in October, 1895, there was evidence tending to show that they were sold to him as receiver of the company on the verbal order of an agent; that as such receiver he had previously purchased like goods of the plaintiff; that the goods were shipped to him as receiver, and letters were sent to him addressed "A. T. M., Receiver C. & K. Co.," asking for "your check" and for settlement of "your account," to which he replied on paper headed "M. Brothers Company," promising payment and signing it "A. T. M." Payment having been delayed, the plaintiff again wrote, asking the defendant to "let us have your check by return mail." This was answered on paper of the "B. Manufacturing Company," of which, when the goods in controversy were ordered, the defendant was treasurer, and to which he had sold the assets of the C. & K. Company. A subsequent letter, signed by the B. Manufacturing Company was sent, saying, "We will send you a check on Saturday." The plaintiff replied that he knew nothing of the company, and looked to the defendant for payment. Subsequently a check for a partial payment was sent in a letter signed "B. Mfg. Co., A. T. M., Treas.," which stated that the company had always regarded this account as belonging to it as successor of the C. & K. Co., but added, "However, this is a matter of little importance." *Held*, that the jury were warranted in finding that the defendant was liable.

CONTRACT on an account annexed. At the trial in the Superior Court before *Hammond*, J., the jury returned a verdict for the plaintiff, and the defendant alleged exceptions. The material facts appear in the opinion.

F. S. Hesseltine, for the defendant.

S. L. Whipple, for the plaintiff.

HOLMES, J. This is an action of contract for the price of some spelter. The plaintiff has had a verdict and the case is here on exceptions to evidence, and to the refusal to direct a verdict for the defendant. The defendant had been receiver of the Craighead and Kintz Manufacturing Company, and had

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ordered spelter of the defendant before October, 1895, when the order was given out of which the controversy arises. It was given verbally, by a man who represented himself as the defendant's agent. The goods were shipped to the order of the defendant as receiver, and a statement of the account was sent to him. In January, February, and March, 1896, letters were sent to "A. T. Morrill, Esq., Receiver Craighead & Kintz Mfg. Co.," asking for "your check" in settlement, and for settlement of "your account." On April 1, the defendant answered on paper headed "Morrill Brothers Company," explaining his silence, and saying, "I will let you hear from me about the middle of next week." The signature was "A. T. Morrill." On the foregoing statement, plainly it would have been impossible to rule that there was no evidence of the defendant's personal liability. It was objected, to be sure, that evidence as to how the goods were directed was not admissible, but it properly was admitted, not only as a step in the proof of the delivery of the goods, but in connection with the bill and letters as evidence of an admission. *Sturtevant* v. *Wallack*, 141 Mass. 119, 122, 123.

The goods not having been paid for as promised in the defendant's letter of April 1, 1896, the plaintiff sent another letter on April 17, asking the defendant to "let us have your check by return mail." This was answered by the defendant on paper of the Ballardvale Manufacturing Company, a new company, as will be explained in a moment, and after two more letters a letter was written on June 3, signed by the new company, giving excuses and saying, "We will send you a check on Saturday." The next day the plaintiff replied, saying that it knew nothing of the company and looked to the defendant for payment. On June 8, the company, in a letter signed "Ballardvale Mfg. Company, A. T. Morrill, Treas.," sent a check for $600 on account, saying that the company always had regarded this account as belonging to it as successor of the Craighead & Kintz Co., but adding, "However, this is a matter of little importance." The defendant thus again, it would seem, admitting, as the presumptive composer of the letter, that the plaintiff, if it insisted, might look to him. The plaintiff never admitted that the defendant was not its debtor.

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To meet this case the defendant testified that a new company, the Ballardvale Manufacturing Company, of which he became treasurer, was formed on July 27, 1895, and that on that day he sold the assets which he held as receiver to it through a third person. He also put in a letter dated July 18, notifying the plaintiff that he sold the assets on May 4, but that there had been a delay, and saying that he hoped the sale would be consummated that week. These facts perhaps may be assumed not to have been denied. The defendant further testified that he did not give any one authority to order these goods for him, or know that they had been sent or charged to him personally or as receiver. On the other hand, the plaintiff's agent testified that, as the defendant's letter spoke of delay, he supposed that the defendant wanted spelter on that account. It could not be ruled, as matter of law, that notice of a sale which was not yet consummated, and as to which there already had been unexpected delay, was notice that the defendant would not want any more spelter as receiver, and therefore would buy no more on his personal responsibility. Neither did the fact of the sale having been consummated make it impossible for him to order goods personally. It may have been a good ground for believing his denial of authority, but of that the jury were to judge. As against it there were the admissions implied by the correspondence, which warranted a finding that, if the defendant had not authorized the purchase in his name, he had ratified it. It is possible that he meant to give the new company the benefit of his name.

Exceptions overruled.

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188 264

MARGARET L. McINTIRE *vs.* RALPH H. WHITE & another.

Suffolk. March 9, 1898. — May 19, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Personal Injuries — Negligence — Assumption of Risk — Breach of Employer's Duty to Employee.

In an action for personal injuries occasioned to the plaintiff while in the defendant's employ as a salesgirl, it appeared that she had been sent up stairs to a room in a new part of the shop, to which the public had not had access; that on her return she took a different way from that by which she went, and started down a winding staircase which also was not open to the public at the time; that the stairs were new and had been treated with oil or shellac; that to protect them while drying a loose piece of pasteboard had been placed upon each step, not covering it quite equally, the step not being of equal width throughout; that the plaintiff tripped or slipped on one of the pieces of pasteboard when part way down the stairs, fell, and broke her ankle; and that the staircase was light, and she understood the arrangement and its purpose. *Held*, that the defendant was not guilty of any breach of duty, and that the presiding judge rightly directed a verdict for the defendant.

TORT, for personal injuries occasioned to the plaintiff while in the defendants' employ as a salesgirl, from falling on a flight of stairs situated on the defendants' premises. Trial in the Superior Court, before *Maynard*, J., who directed the jury to return a verdict for the defendants; and the plaintiff alleged exceptions, which appear in the opinion.

G. R. Swasey, (*E. O. Thayer* with him,) for the plaintiff.

J. Lowell, for the defendants.

HOLMES, J. This is an action of tort for personal injuries. The plaintiff was in the employ of the defendants and had been sent up stairs to a room in a new part of their shop, to which the public as yet had not had access. On her return she took a different way from that by which she went, and started down a winding staircase, which also was not open to the public at the time. The stairs were new and had been treated with oil or shellac. To protect them while drying a loose piece of pasteboard had been placed upon each step, not covering it quite equally, the step not being of equal width throughout. The plaintiff tripped or slipped on one of the pieces of pasteboard

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when part way down the stairs, fell, and broke her ankle. The staircase was light, and the plaintiff understood the arrangement and its purpose.

We are of opinion that these facts would not warrant a jury in finding the defendants guilty of any breach of duty, and that the presiding judge rightly directed a verdict for the defendants. There was no concealed danger. There was nothing of which the plaintiff could have been warned which she did not know already. The device adopted to protect the stairs was a familiar and proper one. There was at least no greater likelihood of harm than in the case of brass covered stairs where the brass was worn smooth. *Crafter* v. *Metropolitan Railway*, L. R. 1 C. P. 300.

Exceptions overruled.

WILLIAM D. DRURY *vs.* PAUL BUTLER & another, administrators.

Middlesex. March 10, 1898. — May 19, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Attorney at Law — Negligence — Taking of Land — Delegation of Powers by Town to Selectmen — Pleading — Statute of Limitations — Release of Rights — Subrogation.

In an action of contract for breach of an agreement by an attorney at law to preserve the plaintiff's rights in reference to the taking of a strip of land by the town of Framingham, acting under St. 1887, c. 403, for the construction of a sewer, it appeared that the town accepted the act in 1888; that thereafter it complied with § 2 of the act, and laid a sewer through the plaintiff's land, which it completed in the summer of 1889, without any formal taking of the land; that in September, 1889, the plaintiff employed the defendant's intestate, who accepted a retainer and brought an action of trespass against the town for the unlawful entry; that on November 17, 1890, the town voted that the town take and seize, under the provisions of chapter 403 of the Acts of 1887, "All such land . . . in the towns of Framingham and Natick as are, in the judgment of the selectmen, necessary for its system of sewage disposal and connections therewith; and that the selectmen be a committee, with full power, to do all and singular, any and all acts and things necessary for such taking and seizure, with authority to employ counsel and incur all necessary expenses"; that on December 6, 1890, the selectmen recorded in the registry of deeds a description of a strip of the plaintiff's land, which taking purported to be by the town acting by its selectmen; that the defendant's intestate was soon afterwards notified of this taking, and he then agreed to protect the plaintiff's rights with reference

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thereto; that he neglected, without notifying the plaintiff thereof, for more than two years after the taking, which was the limit within which such petition could be filed, to file any petition for an assessment of damages to the plaintiff caused by the taking; that no such petition was brought by the plaintiff before beginning this suit; and that in 1896 the plaintiff compromised his action of trespass against the town and released to the town the land in question, stipulating in connection with the compromise and release that his rights against the defendant should not thereby be affected. *Held*, that there was a valid taking of the plaintiff's land which gave him a right to recover; that there was evidence that the plaintiff suffered damage from the neglect of the defendant's intestate; and that the defendant had no right of subrogation, and the release to the town was not a bar to the plaintiff's claim.

CONTRACT, for a breach of an agreement by the defendants' intestate, an attorney at law, to preserve the plaintiff's rights and protect his interests in reference to the taking of a strip of land by the town of Framingham for the construction of a sewer. At the trial in the Superior Court, before *Sherman*, J., the jury returned a verdict for the plaintiff; and the defendants alleged exceptions, the nature of which appears in the opinion.

L. S. Dabney, (*F. L. Washburn* with him,) for the defendants.

J. B. Goodrich, (*T. J. Kenny* with him,) for the plaintiff.

KNOWLTON, J. The defendants' intestate, an attorney and counsellor at law, agreed with the plaintiff for a valuable consideration to preserve the plaintiff's rights and to protect his interests in reference to the taking of a strip of land by the town of Framingham for the construction of a sewer, and the plaintiff intrusted the business to him. He allowed more than two years to elapse after the taking without bringing a suit or taking any measures to obtain damages for the plaintiff, whereby, as the plaintiff alleges, the right to recover damages from the town was lost. This action was brought to recover damages for the breach of the contract to protect the plaintiff's interests.

The town was acting under the St. 1887, c. 403. On the 20th day of February, 1888, at a meeting duly called, it had voted to accept the act. In the same year it employed contractors and laid a sewer through the plaintiff's land, which it fully completed in the summer of 1889. Apparently it adopted and completed a system of sewerage under the authority of the statute. It had complied with § 2 of the statute, which provides that no act shall be done in the construction of a sewer

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until the system and location have been approved by the State board of health, after a hearing, the time and place of which is to be made known by publication of an official notice thereof. All this was done without any formal taking of the plaintiff's premises and filing of a description thereof in the registry of deeds, as required by the statute. In September, 1889, the plaintiff employed the defendants' intestate, and he brought an action of trespass against the town for the unlawful entry upon the plaintiff's land. This action was pending until it was settled, on July 3, 1896, by the payment to the plaintiff of eight hundred dollars as damages, and one half of the taxable costs. On November 17, 1890, at a meeting duly called, the town voted "that the town take and seize under provisions of chapter 403 of the Acts of the Commonwealth passed in the year 1887, all such land, water rights, rights of way, and easements in the towns of Framingham and Natick as are, in the judgment of the selectmen, necessary for its system of sewage disposal and connections therewith; and that the selectmen be a committee, with full power, to do all and singular, any and all acts and things necessary for such taking and seizure, with authority to employ counsel and incur all necessary expenses." On December 6, 1890, the selectmen filed and caused to be recorded in the registry of deeds a description of a strip of the plaintiff's land thirty-four feet wide, running the entire length of his lot, namely, fifteen hundred and fifty-two feet, and of certain other lands, which taking purported to be by the town, acting by its selectmen under authority of the statute and of the vote above quoted, and recited that the land was taken for the purposes mentioned in the act and in the vote, for the sole use and benefit of the town of Framingham. The defendants' intestate was soon afterwards notified of this taking, and he then made the agreement above stated in regard to it. Under the statute a petition for the assessment of damages caused by the taking of land could be filed within two years from the taking, and not afterwards. St. 1887, c. 403, § 4. The plaintiff, by a deed dated June 29, 1896, released to the town of Framingham this land for a valuable consideration, and it was stipulated in connection with the settlement of his suit for trespass and in connection with the making of this deed of release that his rights

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against the defendants in the present suit should not be affected by the settlement of the claim for trespass, or by the release.

Three questions are presented by the bill of exceptions. First, Was there such a taking of the plaintiff's land by the town of Framingham as gave him a right to recover damages therefor? Secondly, Is there any evidence that the plaintiff suffered damage from the neglect of the defendants' intestate to prosecute his claim, inasmuch as he has not attempted to bring a suit for the taking of his land after the expiration of two years? Thirdly, Is the release of June 29, 1896, a bar to the plaintiff's claim?

1. The defendants' objection to the validity of the taking is that the town could not delegate to its selectmen or to a committee the determination of what land should be taken. If we assume that the town could not, in the first instance, delegate to the selectmen the right to bind the town by a taking for the construction of a sewer whose location had not been determined by a vote of the town, it does not invalidate the taking in the present case. We find here that the town had adopted its system of sewers, had obtained an approval of the location thereof from the State board of health, and had completed the construction of the sewer before it made a valid taking of the land. Having a system of sewers constructed, it voted to take land for it, and delegated to the selectmen the determination of the question what "land, water rights, rights of way, and easements" were necessary for it. This presented merely a question of detail, and we are not prepared to say that the town could not delegate the decision of it to its selectmen. However this may be, the selectmen made the taking in the name of the town, assuming that they were duly authorized so to do, and the case shows ample evidence that the town ratified their action. This ratification need not be by a formal vote. *Fisher* v. *Attleborough School District*, 4 Cush. 494. *Lynch* v. *Forbes*, 161 Mass. 302, 309. The plaintiff acquired a right to recover damages for the taking.

2. It is contended that no damage on account of a breach of contract is shown, because it does not appear that the town would not have waived its right to object that the suit was not seasonably brought if the plaintiff had filed his petition after the

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expiration of the two years. Without determining whether such a suit could be maintained against a town if commenced after the expiration of the time within which the statute permits the filing of a petition, and if the town made no objection on account of the delay, it is enough to say that the plaintiff lost a valuable right by the failure of the defendants' intestate to bring a suit seasonably, and it is not to be assumed that the town would allow him afterwards to proceed as if he had the right. *Prima facie* the loss of such a right would cause him damage.

3. The release subsequently executed by the plaintiff to the town is not a bar to this action. After the loss of his right to maintain an action, he properly might make the best arrangement with the town that he could. If he was able to obtain by an adjustment or compromise something to diminish his loss, the jury should take it into account, and they are presumed to have taken it into account in assessing the damages.

The facts of this case show no right of subrogation in the defendants. *Exceptions overruled.*

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186 175

SERCOMBE-BOLTE MANUFACTURING COMPANY *vs.* JOHN P. LOVELL ARMS COMPANY.

Suffolk. March 15, 16, 1898. — May 19, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Goods sold — Action — Finding.

A., who was the agent of a corporation in a certain city, and also had the exclusive sale of B.'s bicycles in that place, asked B. to have "my tires" (meaning the tires made by the corporation) put on the wheels which he ordered, B. giving him credit for the tires, and said that for his own accommodation he would like to have the tires come from the corporation, and to have them charged to B., because he would like to keep the tire account separate. Accordingly it was arranged that A. should send the goods from the corporation, billed by the latter to B., and that they should be credited to the corporation and be charged off by a draft of B. on A. in favor of the corporation, and the bicycles sent to A. were to be charged to him by B.; and this course of business was pursued. Bills were sent by the corporation to B. without objection on the part of the latter, who, upon request by the corporation for payment, sent it a draft

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in settlement of account, requesting that it be placed to his credit. *Held*, in an action by the corporation against B. for tires sold and delivered, that a finding for the plaintiff was warranted.

CONTRACT, upon an account annexed, for the price of bicycle tires sold and delivered. Trial in the Superior Court, without a jury, before *Richardson*, J., who found for the plaintiff, and, by agreement of the parties, reported the case for the consideration of this court. The facts appear in the opinion.

A. Hemenway & E. B. Adams, for the defendant.

G. R. Nutter, for the plaintiff.

HOLMES, J. This is an action for bicycle tires sold and delivered. The answer is a general denial. The judge found for the plaintiff on the evidence and pleadings, and the only question before us is whether the finding was warranted as matter of law. There is no doubt that the defendant had the goods, but it contends that it bought them of one Sercombe, with whom the general course of dealing was arranged. Sercombe was the secretary and agent of the plaintiff in Milwaukee, and also had the exclusive sale of the defendant's bicycles in the same place. At the beginning of the year 1893, Sercombe asked the agent of the defendant to have "my tires" (meaning the tires made by the plaintiff) put on the wheels which he ordered, the defendant giving Sercombe credit for the tires, and said that for his own accommodation he would like to have the tires come from the plaintiff, and to have the tires charged to the defendant, because he would like to keep the tire account separate. Accordingly it was arranged that Sercombe should send the goods from the plaintiff, billed by the plaintiff to the defendant, and that they should be credited to the plaintiff and be charged off by a draft of the defendant on Sercombe in favor of the plaintiff. The bicycles sent to Sercombe were to be charged to him by the defendant. This course of business was pursued. Bills were sent by the plaintiff to the defendant without objection on the part of the latter, and when after a time the plaintiff wrote a letter requesting payment, the defendant sent it a letter saying that it enclosed, and enclosing, a draft in settlement of account, and requesting the plaintiff to place the same to the defendant's credit. The defendant now seeks to bring its liability for the tires into its account with Sercombe, who is largely indebted to it, even after deducting the price of the tires.

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In the argument for the defendant the foregoing arrangement was spoken of as mere bookkeeping, and it was pressed that in substance the defendant insisted on buying tires only on the condition that they could be set off against Sercombe's account. It is argued that the importance attached by the defendant to this stipulation is shown by its refusal to buy more tires than could be used on the wheels sent to Sercombe, and by a conversation in which Sercombe sketched the arrangement to the plaintiff's vice president. We do not think that this is the necessary conclusion from the evidence. On the contrary, it appears by the present state of the account that the defendant at that time was perfectly willing to give Sercombe credit, and it appears also that it did deal with the plaintiff as seller of the tires. Unless and until Sercombe should fail to honor the drafts upon him in favor of the plaintiff, it made no difference to the defendant which of the two was its vendor. The chances are that it never thought of the difference which there might be in case of Sercombe's insolvency. Certainly we see nothing which conclusively shows that it had that matter in mind. We should add that no great weight can be attached to the use of the first person by Sercombe, — "my tires," "I am to send him the telegram tires," etc. In the first place, the practice was not quite uniform; in the second, it was no more than is common among salesmen, who nevertheless are not setting themselves up against the house that employs them. We are of opinion that the judge was warranted in finding that the actual arrangement between Sercombe and the defendant was that it should become the plaintiff's debtor, and that, although a particular mode of payment, namely by draft on Sercombe, was provided for, this, if it bound the plaintiff at all, might be found to hold good only so long as Sercombe was solvent. *Hayes* v. *Kelley*, 116 Mass. 300. *Sturtevant* v. *Wallack*, 141 Mass. 119. *Bertha Mineral Co.* v. *Morrill*, *ante*, 167. In this view of the case, no question arises of the defendant's right to bring its claim against Sercombe into the account, and it is not necessary to consider whether the right, if it existed, would have to be pleaded. See *Goldthwait* v. *Day*, 149 Mass. 185; *Dewing* v. *Dewing*, 165 Mass. 230; *Foster* v. *Graham*, 166 Mass. 202; *Kingsley* v. *Delano*, 169 Mass. 285.

The finding of the judge below also could be justified on the

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ground that, whatever the arrangement between the defendant and Sercombe, it knew that the tires were to be ordered of the plaintiff in such a way that the plaintiff naturally would understand that it was selling. The evidence, assuming all that was put in to have been admissible, did not conclusively establish notice of a different understanding on the defendant's part. But it is unnecessary to present other grounds since the first which we have mentioned seems to us enough to support our decision.

The draft sent by the defendant was not pleaded, and is not relied on as a satisfaction of the debt.

Judgment on the finding.

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THOMAS M. SMITH *vs.* ABINGTON SAVINGS BANK.

Suffolk. March 16, 1898. — May 19, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Covenant against Encumbrances — Sewer Assessment — Validity of Laying out of Sewer — Evidence.

Upon the trial of an action on a covenant in a deed of land against encumbrances except "the taxes assessed for the year 1893," evidence offered by the defendant that the written contract of sale in pursuance of which the deed was given stated that a good and clear title should be given except the taxes assessed on May 1, 1893, was properly excluded.

When in proving the laying out of a sewer in a town it becomes necessary to show that the town voted to adopt a plan and system of sewerage made by a civil engineer, it is competent, after the town clerk has testified that he cannot find the report among his records, to admit a letter, produced from other custody, signed by the engineer, addressed to one of the committee of the town, and proposing a system of sewerage which the town clerk testifies he has no doubt was the report adopted.

Where the report of a civil engineer recommending a plan of sewerage for a town, which is in evidence, refers to an accompanying plan or map, and the town clerk testifies that he cannot find the original plan in his office, an office plan of the engineer, a copy of which he testifies was delivered to the town, is competent, and the evidence will warrant a finding that it was the map or plan referred to in the report.

An article in a warrant for a town meeting, "To see what action the town will take in regard to some system of sewerage, and raise and appropriate money for the same," will warrant a vote of the town to borrow money for the construction of the sewer.

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A town, under an article in the warrant, "To see what action the town will take in regard to some system of sewerage," adopted the engineer's report, which stated that "the northerly side of B. Hill will drain into the sewer described above through A. Avenue." B. Avenue was situated in this district. *Held*, that the laying out of a sewer on B. Avenue, the course of which through that avenue was indicated by a red line on a plan accompanying the report, was sufficiently definite and certain.

In an action upon a covenant against encumbrances in a deed of land to recover the amount of a sewer assessment unpaid at the time of the conveyance, and which the grantee afterward paid, it is unnecessary for the plaintiff, if he proves that the sewerage system was laid out according to law, also to prove the validity of the assessment.

It is not necessary to give notice to the party to be charged by a sewer assessment before the same is levied.

After a town had voted to adopt a plan of sewerage, and to authorize the selectmen to levy an assessment of seventy per cent, based upon the average cost of all sewers, it voted, under an article "To see if the town will vote to lay a sewer assessment of seventy per cent of the total cost of all sewers," that it would "ratify the doings of the selectmen in levying the sewer assessment of seventy per cent." *Held*, that there was evidence from which it might be found that the selectmen had previously purported to levy the assessment on an estate so as to constitute an encumbrance thereon within the covenant against encumbrances in a deed of such land which was given three months before the last vote of the town.

CONTRACT, upon a covenant against encumbrances in a deed conveying land in the town of Revere.

The declaration alleged that, on July 7, 1893, the defendant executed and delivered to the plaintiff a deed wherein it covenanted that the premises described therein were "free from all encumbrances made or suffered by it except the taxes assessed for the year 1893," and that the plaintiff, relying on the covenant, received the deed and paid the consideration therefor; that the premises were not free from all encumbrances, but were subject to an assessment for the construction of a sewer authorized by a vote of the town of Revere on February 8, 1892, of which at the time of the conveyance to him the plaintiff was ignorant; and that the plaintiff had been required to pay and had paid the assessment. Answer: 1, a general denial; 2, that the sewer assessment was illegal and void, and could not have been reassessed, and that the proceedings of the town on which the assessment was based were illegal and void; 3, that the plaintiff paid the sewer assessment without right and without any legal obligations so to do.

After the former decision in this court, reported 165 Mass. 285, the case was tried in the Superior Court, without a jury,

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before *Hammond*, J., who allowed the following bill of exceptions.

The defendant, by a quitclaim deed dated July 7, 1893, conveyed to the plaintiff a parcel of land on Bellingham Avenue in Revere, and covenanted that the same was free from all encumbrances "except the taxes assessed for the year 1893." At the time of the conveyance the estate was subject to the encumbrance of a lien of an unpaid assessment for the construction of a sewer voted by the town of Revere on September 23, 1893.

The town clerk of Revere, called by the plaintiff, produced his records for the town meeting held on October 12, 1891, the warrant for which contained the following article: "To see what action the town will take in regard to some system of sewerage, and raise and appropriate money for the same." Under this article the town voted to adopt a system of sewerage, and appointed a committee to report a plan therefor. At an adjourned town meeting, held December 14, 1891, the report of the committee was accepted, and it was voted that the system proposed and planned by Herbert T. Whitman, civil engineer, be adopted. It was also voted that the committee be joined to and act with the selectmen in preparing the details, and in employing an engineer to prepare plans and specifications, and to act with the selectmen in all matters pertaining to the construction of the sewerage system as proposed, the joint committee to advertise for bids, and report at an adjourned meeting. At such adjourned meeting, held February 8, 1892, on recommendation of the committee the town under article 10 of the warrant, voted to borrow money for the construction of the sewerage system, and that all money received from sewer assessments should be deposited in a bank or trust company to liquidate the sewer debt as it became due, and further voted, "That the selectmen and committee having the matter in charge be authorized and instructed to proceed and construct a system of sewerage with the least possible delay practically in accordance with plans heretofore submitted by H. T. Whitman, C. E., and adopted by the town, making only such changes in pipes, etc., as circumstances may seem to justify upon a more studied consideration of the same, and that the selectmen be, and are hereby instructed, to levy an assessment upon all owners of real estate

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within such territory where sewers are laid, of seventy per cent, based upon the average cost of all the sewers therein, according to chapter 50 of the General [Public] Statutes."

At a town meeting held on September 23, 1893, pursuant to a warrant containing the following article: "To see if the town will vote to lay a sewer assessment of seventy per cent of the total cost of all sewers constructed under vote of February 8, 1892, or that may be constructed hereafter, based upon the area of the depth of one hundred feet on all estates bordering on streets or ways where sewers are laid, according to chapter 50 of the Public Statutes."

On recommendation of the board of selectmen it was voted "To ratify the doings of the selectmen in levying the sewer assessment of seventy per cent of total cost of all the sewers."

The town clerk having testified that he had, after search among the town records, been unable to find the original of the engineer's report, or his plan prepared in December, 1891, was shown a letter from the engineer to one Curtis, a clerk of the committee, dated December 12, 1891, which he testified he had no doubt was the report made by the committee. The letter was admitted, subject to the exception of the defendant. It outlined a definite plan of sewerage, with estimates of the cost, and referred to accompanying plans and a map, and stated that "The northerly side of Beachmont Hill will drain into the sewer described above through Atlantic Avenue, and into the tank through Ocean Avenue." Bellingham Avenue, on which lay the plaintiff's land, was in this district.

The engineer was called, and produced his office plan, a copy of which he testified was delivered to the town of Revere in the fall of 1891 or spring of 1892. This was admitted, subject to exception, and the engineer testified that the course of the sewer through Bellingham Avenue was indicated on it by a red line, and that Bellingham Avenue was included in the plan which he originally gave.

The collector of taxes for the town of Revere testified that the warrant for the sewer assessment was dated September 23, 1893, and that the assessment was paid on November 16, 1893.

One of the selectmen of Revere was called and produced the sewer assessment book, from which he read the oath of the se-

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lectmen to the truth of the "list of the names of all the persons known to us who are liable for taxation in the town of Revere for the seventy per cent of the cost of the system of sewerage built by the vote of the town passed February 8, 1892, and assessed by us by virtue of the vote of the town passed September 23, 1893."

The defendant then offered to show that the written contract of sale, in pursuance of which the deed in question was given, stated that a good and clear title should be given, to be free from all encumbrances except taxes assessed on May 1, 1893; but the testimony was excluded, and the defendant excepted.

The defendant requested the judge to rule; 1, that upon the pleadings it is necessary for the plaintiff to prove (a) that he was obliged and compelled to pay the sewer assessment; (b) that the assessment was legal and valid in all respects, or if invalid in any respect that it could be reassessed; (c), that the defendant, its tenants or lessees, had notice of the assessment; 2, that upon the evidence the plaintiff cannot recover; 3, that if he can recover he is entitled to only nominal damages; 4, that the tax bill presented to and paid by the plaintiff creates no presumption that the sewer tax was legally assessed; 5, that the sewer assessment is a tax assessed for the year 1893, and comes under the exception in the covenant in the deed to the plaintiff; 6, that, as matter of law, the description of the sewers to be built contained in the votes of the town was too indefinite, and the assessment is invalid; 7, that, as matter of law, there was no legal laying out of the sewer, and there could be no legal assessment levied therefor; 8, that, as matter of law, if the defendant or its tenants or lessees had no notice of the laying of this assessment, the assessment was invalid, and the plaintiff cannot recover; 9, that, as matter of law, the evidence shows that no legal or valid assessment was or could have been made for the construction of this sewer after the passage of the votes of the town; 10, that under article 10 of the warrant the town had no power to borrow money for the construction of the sewer; 11, that the town, having voted to borrow money to construct the sewer, had no power to levy an assessment, under chapter 50 of the Public Statutes, for the purpose of placing the money thereby raised in some bank or

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trust company to pay debts accruing years afterward; 12, that under the warrant, the town had no power to levy an assessment, under chapter 50 of the Public Statutes, to pay debts maturing years afterward; 13, that the vote of the town instructing the selectmen to levy an assessment was too indefinite, and no assessment thereunder could be valid; 14, that the vote of the town, September 23, 1893, was illegal, and did not operate to legalize the assessment paid by the plaintiff, for, (a) it did not follow the article in the warrant; (b) the act of the selectmen in laying an assessment could not be ratified if it was originally made without legal authority.

The judge declined to give the requests numbered 2 to 7, and 9 to 14, and gave the request numbered 1, but substituted in 1 (a) the word "paid" for the words "was obliged and compelled to pay," and in 1 (c), and in request numbered 8, substituted the words "party to be charged" for the word "defendant," and inserted the word "legal" before the word "notice."

The judge found for the plaintiff; and the defendant alleged exceptions.

J. F. Simmons, for the defendant.

J. H. Colby & E. A. Bayley, for the plaintiff, submitted the case on a brief.

HOLMES, J. This is an action upon the covenant against encumbrances in a deed conveying land in the town of Revere. The encumbrance relied on is an assessment for the construction of a sewer, voted by the town of Revere on September 23, 1893. The deed was dated July 7, 1893, and the covenant declared on excepted "the taxes assessed for the year 1893." It already has been decided that the encumbrance alleged is not within the exception. *Smith* v. *Abington Savings Bank*, 165 Mass. 285. The case now has been tried, and the plaintiff has had a verdict, subject to exceptions taken by the defendant, which are before us.

We may as well dispose first of an offer of evidence intended to affect the construction of the covenant. The defendant offered to show that the written contract of sale in pursuance of which the deed was given stated that a good and clear title should be given except the taxes assessed on May 1, 1893. Perhaps it would be enough to say that we do not perceive how this

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different language can be thought more favorable to the defendant than that which was used in the deed. But if it were more favorable, it could not affect the construction of language used at a later time by the parties, unless coupled with evidence that they actually intended to embody the meaning of the earlier document in the later one. But evidence of actual intent is not admissible to change the construction of written instruments if otherwise plain, for the reason that what a court must look for is not what the parties had in their minds, but the meaning of the words according to the general usage of speech. *Tucker* v. *Seaman's Aid Society*, 7 Met. 188, 205. Reformation, not construction, is the means for meeting such a mistake as supposed. When it is said that the intent of the parties or of a testator is the lodestar, etc., all that is meant is that in interpreting a particular sentence you may look at the general scheme and the habit of language disclosed by the instrument, and may ascertain the facts under which the party acted to qualify what might be the result of the particular words if they were taken alone.

In order to prove the encumbrance the plaintiff undertook to prove the laying out of the sewer. It appeared that on December 12, 1891, and February 8, 1892, the town voted to adopt a plan and system of sewerage made by H. T. Whitman, a civil engineer. The town clerk testified that he did not find the report among his records, but stated that he had no doubt that a letter produced, signed by Herbert T. Whitman, addressed to one of the committee of the town, and proposing a system of sewerage, was the report adopted. This letter was admitted, and the defendant excepted. We see nothing in the cases cited which suggests that secondary evidence of the report was not admissible in a collateral proceeding, — if indeed this was secondary evidence. *Harris* v. *Whitcomb*, 4 Gray, 433, 435. *Howard* v. *Stevens*, 3 Allen, 409, 410. But it does not appear clearly not to have been the original report, although coming from other custody than that of the town clerk, with whom it belonged.

The report was dated December 12, 1891, and referred to accompanying plans and a map. The town clerk testified that he could not find the original in his office. The engineer then was called and produced his office plan, a copy of which he testified

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was delivered to the town of Revere in the fall of 1891, or spring of 1892. This was admitted, subject to exception. This evidence warranted a finding that it was the map or a plan referred to in the report.

The map and report were objected to on the further ground that they show that there was no valid laying out of the sewer, and several rulings were asked and refused to that effect. Two objections are urged. In the first place it is said that the vote of the town to borrow money for the construction of the sewer was not warranted by the article in the warrant for the town meeting. The article was, "To see what action the town will take in regard to some system of sewerage, and raise and appropriate money for the same." It is not pointed out why this was not sufficient, or why, if it was not sufficient to justify the scheme adopted for paying for the sewer, the distinct vote to lay out the sewer was bad. The plaintiff needs to maintain the validity of only the later vote. Next it is said that the vote to lay out the sewer was too indefinite and uncertain. The language of the report adopted by the town, so far as it refers to the immediate neighborhood of the plaintiff's land is, "The northerly side of Beachmont Hill will drain into the sewer described above through Atlantic Avenue, and into the tank through Ocean Avenue." Bellingham Avenue, on which lay the plaintiff's land, was in this district, and, as we understand the testimony, the course of the sewer through it was indicated by a red line upon the plan. So far as we can judge, the sewer in that place might be found to have been laid out definitely enough. *Bennett* v. *New Bedford*, 110 Mass. 433. *Sheehan* v. *Fitchburg*, 131 Mass. 523. *Commonwealth* v. *Abbott*, 160 Mass. 282. But perhaps this particular detail is less important than the question whether the system as a whole which the town voted to construct was sufficiently defined, since the assessment voted was to be based upon the average cost of all the sewers, under Pub. Sts. c. 50, § 7. *Leominster* v. *Conant*, 139 Mass. 384. Taking this to be the proper question, the answer is similar to what we have said about the sewer in Bellingham Avenue. The report shows that a definite plan was proposed, with estimates of the cost. It would seem that the plan appeared in detail upon a map, the original of which was produced. The

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plan was adopted subject to such changes in pipes as further study proved necessary. These facts were evidence at least that the lay-out was not too vague.

If the system was laid out according to law, it is not necessary to inquire into the validity of the assessment. "The fact that the assessment is invalid does not remove the lien or encumbrance upon his land. The proper officers could, by proceedings in due form, correct the errors and reassess the same amount upon the land, and, if it was not paid, sell the land." *Coburn* v. *Litchfield*, 132 Mass. 449, 451. However, the objections urged to the assessment do not impress us. The chief one is that no notice was given to the parties to be charged. It is true that notice was not given before the assessment was levied, but that is not required. Notice was given to the plaintiff after it was levied. *Allen* v. *Charlestown*, 111 Mass. 123. Then it is said that the vote of the town was bad because there was no sufficient article in the warrant. But after the first vote of 1892 adopting the plan, and also voting that the selectmen should levy an assessment of seventy per cent, based upon the average cost of all the sewers, an article was put into the warrant for a meeting, "To see if the town will vote to lay a sewer assessment of seventy per cent of the total cost of all sewers constructed under vote of February 8, 1892," etc. Under this article it was voted "to ratify the doings of the selectmen in levying the sewer assessment of seventy per cent," etc. There was evidence from which it might have been found that the selectmen previously had purported to levy the assessment on the estates concerned. The vote appears to us to have followed the warrant, and to have been valid. We have dealt with the main arguments addressed to us, and have examined the record. We see no error entitling the defendant to a new trial.

Exceptions overruled.

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JOHN FLEMING *vs.* ABRAHAM A. ELSTON.

Suffolk. March 18, 1898. — May 19, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Personal Injuries — Employers' Liability Act — Superintendence — Negligence of Fellow Servant.

An old and experienced employee, who was employed in taking down a building, was lying on the floor lifting a piece of iron which he was able to lift alone, and which had been loosened from the outside wall and was to be lifted to the floor. While in this position something struck him under his leg and he lost his balance and fell into the street and was injured. There was some evidence that a superintendent was near the plaintiff just before the accident, with a crowbar in his hand; but if the plaintiff was struck by the crowbar, none of the circumstances appeared. *Held*, in an action under the employers' liability act, St. 1887, c. 270, that, if there was any negligence, it did not appear not to have been that of a fellow servant.

TORT, for personal injuries. Trial in the Superior Court, before *Sherman*, J., who ruled that the plaintiff could not maintain his action, and directed a verdict for the defendant; and the plaintiff alleged exceptions. The material facts appear in the opinion.

T. H. Buttimer, for the plaintiff.

E. B. Hale & J. Fox, (*F. E. Dickerman* with them,) for the defendant.

HOLMES, J. This is an action for personal injuries brought under the employers' liability act, St. 1887, c. 270, § 1, cl. 2, amended by St. 1894, c. 499, § 1, alleging negligence of a person intrusted by the defendant with superintendence of the work on which the plaintiff was engaged. The work was taking down a building. The plaintiff had been lying down upon the floor, holding a piece of iron that was to be loosened from the outside wall and lifted to the floor. He was told to lift it, and did so, when, just as he had it in his hands, something struck him under his leg and upset his balance, so that he fell into the street. The iron was a strip three feet long, eight inches wide, and a quarter of an inch thick, which the plaintiff was able to lift alone, and although of course while it was in his hands his

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balance was more unstable than when his hands were free, there was no impropriety in directing him to lift it. The plaintiff was an old sailor and an experienced hand at the work, and on the whole case the sole responsible cause of the injury must be found in the blow which upset him, and not in any remoter antecedent condition. There was a little evidence that Haskell, who, we assume, might be found to have been a superintendent, was pretty near the plaintiff just before the accident, with a crowbar in his hand, so that perhaps it would not be pure conjecture if it were found that in some way the plaintiff was struck by this crowbar. But none of the circumstances appear, and even if it were admitted that the injury was caused by Haskell's negligence, which would be going rather far, there is nothing to show that it was negligence in the exercise of superintendence rather than in manual labor, in doing which Haskell stood like any fellow servant. Permitting himself or another laborer to be in the plaintiff's neighborhood with a crowbar in his hands could not be found to be negligent superintendence without more, merely because the event showed that it was possible to do harm by negligently handling or by dropping the bar. *Cashman* v. *Chase*, 156 Mass. 342.

Exceptions overruled.

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MARY E. LEWIN *vs.* IDA O. FOLSOM.

Norfolk. March 22, 23, 1898. — May 19, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Mortgage — Future Advances — Interest.

A mortgage was given upon a building partially erected, and the mortgagee advanced at the time of taking the mortgage a part only of the consideration named in the mortgage. The mortgagor agreed to complete the building before a certain date; and it was further agreed between the parties that if the work on the building should not be completed by the time agreed, the mortgagee might take charge of and complete the work, and that all sums so expended should be considered a part of the balance to be advanced on account of the mortgage. The mortgagee agreed to pay the balance of the loan thirty-five days after the completion of the building, provided there were no liens, etc.;

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and the mortgagor by his own fault did not complete the building within the required time, and the mortgagee did not take charge of or complete the work, and was not asked to, and did not offer to advance the balance of the mortgage, though he was always ready and able to advance the balance upon the completion of the building according to the agreement. *Held*, that the mortgagee was not entitled to interest on the money not advanced.

Interest upon interest cannot be recovered simply on the strength of a demand.

BILL IN EQUITY, to redeem land from a mortgage. On April 4, 1895, the plaintiff gave to the defendant a mortgage, in form for $18,000, upon land on which were situated partially erected buildings. The mortgage note was in the ordinary form, and contained a promise to pay "the sum of eighteen thousand dollars in three years from this date, with interest quarterly at the rate of six per cent per annum." At the time of taking the mortgage, the defendant advanced the sum of $10,000 only; and on April 22, 1895, the plaintiff and the defendant executed a written agreement, the material part of which is as follows:

"Whereas said Ida O. Folsom has agreed to loan to said Mary E. Lewin the sum of eighteen thousand (18,000) dollars in manner hereinafter mentioned, and has taken as security for said loan a mortgage for eighteen thousand dollars, dated April 4, 1895, on said real estate, executed by said Mary E. Lewin; and the said Ida O. Folsom has this day paid to the said Mary E. Lewin the sum of ten thousand (10,000) dollars on account of said loan, the receipt of which is hereby acknowledged. Now, therefore, in consideration of the premises and of the mutual covenants between the parties hereto, the said Mary E. Lewin, for herself, her heirs, executors, and administrators, hereby agrees to fully complete said house and stable substantially in accordance with said plans and specifications on or before October 1, 1895, and agrees to save harmless and indemnified the said Ida O. Folsom, her executors, administrators, and assigns, from all liens or other encumbrances affecting the security under said mortgage, and it is agreed that in case said Mary E. Lewin does not discharge such liens or other encumbrances within ten (10) days after demand the said Ida O. Folsom, her executors, administrators, or assigns may pay off or compromise such claims for liens or other encumbrances and any sums so paid, and all costs and expenses sustained by said Ida O. Folsom by reason of said claims shall be deemed part of the balance to

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be advanced on account of the aforesaid loan, and shall be held to be secured by said mortgage. And it is further agreed that if the work on said buildings shall be discontinued or said buildings shall not be completed by October 1, 1895, the said Ida O. Folsom, her executors, administrators, and assigns, may take charge of said work to the exclusion of said Mary E. Lewin and those claiming under her, and prosecute the same to completion in such manner as she may deem expedient at the expense of the said Mary E. Lewin, and all sums so expended shall be considered a part of the balance to be advanced on account of said loan, and shall be held to be secured by said mortgage. And the said Ida O. Folsom, for herself and her executors, administrators, and assigns, hereby agrees to pay the balance of said loan, namely, the sum of eight thousand (8,000) dollars, thirty-five days after the completion of said house and stable, meaning thirty-five days after all workmen have ceased to labor thereon for any purpose, provided there are no liens or other encumbrances against said premises affecting the security under said mortgage, and said house and stable are completed substantially in accordance with the aforesaid plans and specifications."

The plaintiff, through her own fault, did not complete the buildings by October 1, 1895. The defendant never offered nor attempted, nor was asked by the plaintiff either to complete the same or to advance the remaining $8,000 principal, or any part thereof. The defendant was always ready, willing, and able to make the further advance to the plaintiff of eight thousand dollars upon completion of the buildings according to the terms of the agreement of April 22, but never kept any specific sum of eight thousand dollars on hand for this purpose. The defendant advertised the premises for foreclosure for non-payment of interest, and claimed to be entitled to interest on the sum of eighteen thousand dollars from the date of the mortgage.

The case was heard by *Allen*, J., who ruled that after October 1, 1895, the defendant was not bound to advance the remaining $8,000, and who allowed interest on $18,000 to October 1, 1895, and interest on $10,000 only from October 1, 1895, to July 20, 1897, when a payment of $2,000 on account of the principal was made under an agreement of the parties, and interest on $8,000

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from July 20, 1897. A decree was entered in accordance with the rulings of the presiding justice, who, after an appeal by the defendant, reported the case to the full court. No objection was made by the plaintiff to such part of the rulings and decree as allows interest on the full $18,000 to October 1, 1895.

F. W. Kittredge, for the defendant.

G. M. Palmer, (*A. E. Pillsbury* with him,) for the plaintiff.

HOLMES, J. This is a bill in equity to redeem land from a mortgage for eighteen thousand dollars and interest at six per cent, given in fact, although not in form, to secure future advances. The defendant has advanced ten thousand dollars, and the only question is whether the plaintiff is bound to pay interest upon the whole eighteen thousand dollars for any and what time, or is bound to pay it only upon the sum actually received.

The judge who tried the case charged the plaintiff with interest only on the sum actually received by her, except for a short time which is not in controversy, as the plaintiff did not object to the charge. It appears from the report of the facts that the plaintiff did not agree to pay interest on sums not advanced, unless such agreement is implied in the note and mortgage, or in the instrument now to be mentioned.

On April 22, 1895, a few days after the mortgage, the parties executed a sealed instrument reciting that the plaintiff was building a house and stable on her land in Milton, and that the defendant had agreed to lend the plaintiff eighteen thousand dollars, taking a mortgage of the said land as security for it, and that she had advanced ten thousand dollars. In this instrument the plaintiff covenanted, among other things, to complete the house and stable on or before October 1, 1895, that if she did not, the defendant might finish the work at the plaintiff's expense, and that all sums so expended should be considered part of the promised loan, and should be held to be secured by the mortgage. The defendant then covenanted to pay the rest of the loan, eight thousand dollars, thirty-five days after workmen had ceased to labor on the house and stable, provided there were no liens, etc.

The judge further reports that the plaintiff, by default of her contractors, did not complete the buildings by October 1, 1895, and that after that date the defendant was not bound to advance

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the remaining eight thousand dollars. The defendant never has broken her part of the agreement, but neither has she ever offered or attempted to exercise her right to finish the work, and the plaintiff finished it before the bill was filed. The judge allowed interest on the whole amount of the mortgage until October 1, 1895, and after that upon ten thousand dollars, the sum actually advanced, until July 20, 1897, when the plaintiff made a partial payment, and after that upon what remained unpaid.

We think it very plain that the decree was sufficiently favorable to the defendant. We agree with the construction of the defendant's covenant which limits it to the case of the building being finished by October 1. If it is so limited, it would be a harsh thing to make the plaintiff pay interest for money which she never has had and could not have demanded. If we assume what we do not decide, that after October 1 the defendant, although not bound to lend, had a right if so disposed to require the plaintiff to accept the rest of the loan, she did not do so. If she had done so, but had stopped with tendering the amount remaining to be advanced to the plaintiff, even if entitled to damages for a refusal on the plaintiff's part to complete the contract, she would not have been entitled to interest. To gain the right to that it was necessary at least that she should both signify her intent to insist upon her supposed right to make the advance, and should set apart the money which she expected the plaintiff to take.

It so long has been regarded as settled law in this Commonwealth that interest upon interest cannot be recovered simply on the strength of a demand, that we cannot take upon ourselves to revise the reasoning upon which the doctrine was established. It is plain from that reasoning that the cases do not stand on the absence of a technical default, but on the ancient unwillingness to allow compound interest. *Shaw* v. *Norfolk County Railroad*, 16 Gray, 407, 416. *Ferry* v. *Ferry*, 2 Cush. 92. *Henry* v. *Flagg*, 13 Met. 64, 67. *Wilcox* v. *Howland*, 23 Pick. 167, 169. *Hastings* v. *Wiswall*, 8 Mass. 455. *Doe* v. *Warren*, 7 Greenl. 48. Sedgwick, Damages, (8th ed.) §§ 343, 345.

Decree affirmed.

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ATTORNEY GENERAL *vs.* MASSACHUSETTS BENEFIT LIFE ASSOCIATION.

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IN RE PETITION OF ARTHUR LORD & another, receivers.

Suffolk. March 25, 1898. — May 19, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Assessment Insurance Company — Receiver — Time at which Rights are fixed — Emergency Fund — Accrued Claims.

The date when claims against the Massachusetts Benefit Life Association must have accrued, in order to be entitled to priority of payment, is the date of the filing of the bill in equity by the Attorney General for the winding up of its affairs.

Cases where death occurred before the date of the filing of the bill in equity by the Attorpey General against the Massachusetts Benefit Life Association for the winding up of its affairs, though not allowed or presented to the company before that time, are to be deemed accrued claims within the meaning of St. 1890, c. 421, § 14, which provides that any unexhausted portion of the emergency fund shall be used, "first, in the payment of accrued claims upon certificates or policies, or if insufficient to pay such claims in full, they shall be paid *pro rata;* second, if a balance remain, in the payment of like claims thereafter accruing in the order of their occurrence."

PETITION, filed November 23, 1897, by the receivers of the Massachusetts Benefit Life Association, to obtain the instructions of this court as to the meaning of "accrued claims" in § 14 of St. 1890, c. 421, entitled "An Act relating to assessment insurance." A decree was entered that accrued claims "as applied to death claims, embrace and are confined to those claims where the death happened before the filing of the bill in this cause, to wit, August 17, 1897"; and an appeal was taken to the full court. The facts appear in the opinion.

J. H. Young, for an intervening petitioner.

A. G. Weeks, for another intervening petitioner, submitted the case on a brief.

H. V. Cunningham, for certain claimants.

F. W. Peabody, for other claimants.

ALLEN, J. The question in this case arises under St. 1890, c. 421, § 14, which directs the accumulation of an emergency fund, and provides that when an assessment insurance company

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shall discontinue business a receiver may be appointed to administer any unexhausted portion of the fund, which shall be used, "first, in the payment of accrued claims upon certificates or policies, or if insufficient to pay such claims in full, they shall be paid *pro rata;* second, if a balance remain, in the payment of like claims thereafter accruing in the order of their occurrence." It is rightly assumed that the date when the claims must have accrued, in order to be entitled to priority of payment, is the date of the filing of the bill in equity by the Attorney General for the winding up of its affairs; *Merrill* v. *Commonwealth Ins. Co.*, *ante*, 81; but the question which is presented is as to the meaning of the word "accrued." It is contended by the appellant that this means claims which were then due and payable, and that it does not include cases where death had occurred before that date, but claims arising thereon had not been allowed by the company or brought to its attention.

An examination of other sections of the statute leads us to the conclusion that claims of the latter description were intended by the Legislature to be included under the term "accrued." Section 1 declares that "if the benefit is to accrue through the death of the insured person, the contract shall be of life insurance." Section 10 provides that "every policy or certificate . . . shall specify the sum of money which it promises to pay upon the contingency insured against, . . . and the number of days after satisfactory proof of the happening of such contingency at which such payment shall be made; and upon the occurrence of such contingency, unless the contract shall have been voided by fraud or for want of validity, the corporation shall be obligated to the beneficiary for such payment at the time and to the amount specified in the policy or certificate; and this indebtedness shall be a lien," etc. Section 11 provides that if it shall appear to the insurance commissioner that such a company cannot within a reasonable time, not more than three months from the date of the original default, pay its accrued indebtedness in full, he shall report the facts to the Attorney General, who shall apply to the court for an order closing the business of the corporation, and appointing a receiver for the distribution of its assets among creditors. Coming now to the phrase "accrued claims," as used in § 14, it is pretty clear

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that it means claims which have accrued through the death of the persons insured. A distinction is recognized between the obligation to pay and the time at which the payment is to be made. There is nothing in § 11 to lead to a different construction. The phrase "accrued indebtedness," as there used, looks to the future, and may mean all the indebtedness which may have accrued at the time of the payment; but it does not of itself show that such indebtedness must have been allowed by the company, or proved in a formal way.

Some confirmation of the view which we have taken is to be found in other cases. *American Loan & Trust Co.* v. *Northwestern Guaranty Loan Co.* 166 Mass. 337, 343, 344. *Williams* v. *United Reserve Fund Associates*, 166 Mass. 450. *Union Mutual Association* v. *Montgomery*, 70 Mich. 587, 595.

The question whether claims for disability arising from sickness can be allowed by the receivers is not now considered.

Decree affirmed.

JOHN JUDGE *vs.* CHARLES PFAFF & another.

Suffolk. March 25, 1898. — May 19, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Conveyance of Real Estate in Trust — Power of Sale — Statute — Redemption.

A conveyance in trust was made both to secure and extinguish the debt which it mentioned. It provided that the trust should continue until the debt was extinguished unless the trustee agreed to its revocation by the grantor. In pursuance of this purpose the trustee was given different and more extensive powers than those contained in simple mortgages. The power to sell was not the usual one to sell upon a future default which might or might not happen, but a power forthwith or at any time to convert the property conveyed, or any part of it, into money. It was coupled with a power to exchange, and stood alongside of a power to convert realty into personalty, and personalty into realty; and the proceeds of a partial sale might be used to extinguish encumbrances upon the residue. *Held*, on a bill in equity against the trustee for a reconveyance and that he be enjoined from making any further conveyance, that, while the court assumed for the purposes of argument, although the deed expressly contemplated investments, that upon a sale of the whole it would be the trustee's duty to apply so much of the proceeds as was necessary to the payment of the debt, this fact was not sufficient to bring the power

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within Pub. Sts. c. 181, § 17, requiring the publication of notice before a sale under an ordinary mortgage power, nor within § 21 of the same chapter; that the trustee had power to bind himself and the trust estate by contract to make any sale which he had power to execute; and that, assuming that the plaintiff had a right to redeem, he must take the fund as he found it, subject to any changes lawfully made by the trustee, including contracts which in equity have the effect of conveyances.

BILL IN EQUITY, filed in the Superior Court, February 7, 1898, praying for a reconveyance to the plaintiff of certain real estate which he had conveyed to the defendant Pfaff as trustee, to secure certain indebtedness due from the plaintiff to certain parties, and praying also that the defendant Pfaff be enjoined from making any conveyance of the real estate to any other person or persons, and for an accounting.

The bill alleged that on January 8, 1897, the plaintiff conveyed to the defendant Pfaff, subject to mortgages amounting to $75,686, six certain parcels of land described, in trust, the deed, after the habendum clause, containing the following provisions, among others:

"Whereas the said grantor is jointly indebted to the H. & J. Pfaff Brewing Company, being a corporation duly organized by law and having its usual place of business in said Boston, and to Joaquin K. Souther and Clarence V. Souther, doing business under the firm name of J. K. Souther & Sons, in said Boston, in the sum of fifteen thousand one hundred dollars; and

"Whereas the said grantor has requested the said H. & J. Pfaff Brewing Company and J. K. Souther & Sons to hereafter advance him seventy-nine hundred dollars, which they hereby jointly obligate themselves to do.

"Now, therefore, as and for security for the aggregate of said indebtedness and advance, to wit, the sum of twenty-three thousand dollars, the said grantee, his heirs and assigns, shall hold said property in trust, as follows:

"I. To hold, manage, and take care of the same as a trust estate or fund, with the following special powers, as well as the ordinary powers of management, to wit: . . .

"(*b*) To sell, partition, exchange, or release any of the property, real or personal, at any time belonging to the trust estate as a whole or in parcels, for cash or on credit, at public or private sale, at such time or times and subject to such terms, restrictions,

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conditions, and agreements as he shall see fit to give deeds accordingly, and with or without covenants; and such sale, partition, exchange, or release shall forever bar me and all persons claiming under me from all right and interest in said premises, whether at law or in equity, and that the same may be made without further notice to me or permission of the court to sell, and I hereby for myself, my heirs and assigns, covenant with the grantor and his heirs and assigns that in case a sale or sales shall be made I or they will upon request execute, acknowledge, and deliver to the purchaser or purchasers a deed or deeds of release confirming such sale; provided, however, that no sale as aforesaid shall be made within one year from the date of these presents.

"(*c*) To convert realty into personalty, and personalty into realty.

"(*d*) To use such cash as may at any time belong to the trust fund for the purpose of reducing or paying off mortgages or other encumbrances upon it, or to employ such cash to the reduction of the said indebtedness of twenty-three thousand dollars of the grantor to the H. & J. Pfaff Brewing Company and J. K. Souther & Sons.

"(*e*) To borrow money on such terms as they see fit, either for the purpose of reducing, paying off, taking up, or extending mortgages or other encumbrances at any time existing upon the trust estate, or any part thereof, or for the purpose of building or making permanent improvements upon any real estate at any time belonging to the trust, or to apply the same to the reduction of the said indebtedness of twenty-three thousand dollars; to secure such loans by notes, bonds, deeds, power of sale, mortgages, or other obligations binding the trust estate, or any part thereof, in mortgage, pledge, or otherwise, as he shall deem fit; to extend or renew any existing mortgage if he sees fit, and with the following special duties, to wit:

"(*a*) To pay out of the principal of the trust estate all brokers' commission, counsel fees, and other expenses connected with loans to or by the trustee, of sales, exchanges, partitions, or releases made by him, or of purchases or investments, or any expenses incurred in the management of said property and the employment of agents. . . .

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"(*b*) To pay all taxes, assessments, disbursements, charges, and expenses connected with said trust estate. . . .

"IV. And after retaining whatever sums he shall see fit to provide for the payment of mortgages or other encumbrances on the estate, and after deducting all expenses from the income received, to pay out the balance of the residue or net income of the trust estate for the purpose of paying the interest on and of reducing the principal of the aforesaid indebtedness of twenty-three thousand dollars. . . .

"VIII. At any time during the continuation of this trust the provisions may be altered or annulled by any instrument signed by me and the trustee, and duly recorded with Suffolk Deeds, the intention of this provision being to reserve to myself, with the consent of the trustee, which he is to exercise according to his discretion, a power of revocation. Unless sooner terminated, this trust shall continue until the said indebtedness of the said grantor to the said H. & J. Pfaff Brewing Company and J. K. Souther & Sons shall have been paid in full, and upon such payment this said trust shall terminate, and the said trustee shall pay over and convey the trust property remaining in his hands to the said grantor, his heirs, administrators, and assigns, or to whomsoever he shall in writing designate, or by his last will, duly probated, appoint."

The bill further alleged that the plaintiff had asked the defendant Pfaff to account, but that he had refused so to do; that the plaintiff had reason to believe that the defendant Pfaff was about to convey the real estate, and the plaintiff offered to pay to the defendant Pfaff whatever amount should be due from the plaintiff to the H. and J. Pfaff Brewing Company and J. K. Souther and Sons.

The answer alleged that the plaintiff had no right by the deed to a reconveyance of any of the property except such as should remain subject to the trust, and unconveyed at the time of payment; that the sales provided for in the deed gave to the trustee the most ample powers to sell in his discretion, the only limitation being that the same should not be exercised within one year from the date of the conveyance; that on December 7, 1897, the plaintiff was notified in writing that the trustee would sell part or the whole of the estate, and that after the expiration

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of the year, on January 8, 1898, the plaintiff and his attorney were repeatedly notified orally that the trustee proposed to sell; that on January 20, 1898, the defendant entered into a written agreement, a copy of which was annexed, to sell all the premises to William K. Porter for $88,000, which sum was in excess of the tax valuation, and was as large a price as by any reasonable expectation the trustee could obtain for the property. The bill also alleged that the defendant had never, until the filing of the bill, offered to pay the indebtedness due under the trust agreement, nor had he until that date ever asked for an accounting, and that the defendant was and always had been ready to account.

William K. Porter, who was on motion admitted a party defendant, filed an answer, in which he alleged that he entered into the agreement to purchase the property in good faith, and that the same was legal and binding.

Hearing before *Mason*, C. J., who entered a decree that, it being conceded by counsel that the right to redeem subject to the agreement between the defendant Pfaff and William K. Porter would be of no value and was not desired, and that, unless the plaintiff was entitled to redeem free from an obligation to convey pursuant to said agreement, there was no occasion to ask for an accounting at the time, the said agreement between Pfaff and Porter was a valid contract, and by reason thereof the plaintiff could redeem only subject to the obligation to convey under the agreement, and the bill was dismissed, with costs. The plaintiff appealed to this court.

H. P. Harriman, (*P. Mansfield* with him,) for the plaintiff.

E. B. Hale & D. A. Dorr, (*R. A. Jordan* with them,) for the defendants, were not called upon.

HOLMES, J. The instrument in question is a conveyance in trust, made for the purpose not only of securing but of extinguishing the debt which it mentions. It expressly provides that the trust shall continue until the debt is extinguished, unless the trustee agrees to its revocation by the grantor. In pursuance of this purpose the trustee is given different and more extensive powers than those contained in simple mortgages. The power to sell is not the usual power to sell upon a future default which may or may not happen, but a power forthwith or at any time

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to convert the property conveyed, or any part of it, into money. It is coupled with a power to exchange, and stands alongside of a power to convert realty into personalty, and personalty into realty. The proceeds of a partial sale may be used to extinguish encumbrances upon the residue, and while we assume for the purposes of argument, although the deed expressly contemplates investments, that upon a sale of the whole it would be the trustee's duty to apply so much of the proceeds as are necessary to the payment of the debt, we do not think this fact sufficient to bring the power within the operation of Pub. Sts. c. 181, § 17, requiring a publication of notice before a sale under an ordinary mortgage power. That chapter does not prevent a debtor from conveying property in satisfaction of a debt, either immediately or through the mediation of a trustee with power to sell and apply the proceeds, and § 17 does not interfere with or regulate the exercise of such a power. The contract set up is equally unaffected by § 21, giving a right of redemption unless there has been an entry and three years' possession, or a sale under a power of sale. It is unnecessary to consider whether, if a mortgagee selling at a common foreclosure sale should make a contract in order to cover a short time necessarily spent in completing the conveyance, such a contract would not be a sale within the meaning of § 21.

There is no doubt that the trustee had power to bind himself and the trust estate by contract to make any sale which he had power to execute. *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 52, 59. *Lowe* v. *Swift*, 2 B. & B. 529, 535. *Clarke* v. *Moore*, 1 Jon. & Lat. 723, 727.

It follows that, assuming without discussion that the plaintiff had a right to redeem the fund, (*Parks* v. *Hall*, 2 Pick. 206, 210, 211,) he must take the fund as he finds it, subject to any changes in form lawfully made by the trustee, including contracts which in equity have the effect of conveyances. As the plaintiff did not wish to redeem upon these terms the bill properly was dismissed.

Bill dismissed.

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INHABITANTS OF TISBURY *vs.* INHABITANTS OF WEST TISBURY.

Dukes County. March 28, 1898. — May 19, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Rule to Commissioners — Report to the Court — Statute — Reservation or Report of Questions of Law arising upon an Award — Division of the Corporate Property of a Town upon the Division of the Town into separate Townships.

Questions of law arising upon an award may be reserved or reported, under general provisions of statute, although the statute under which the commissioners are appointed provides that their award, when accepted by the court, shall be binding on all parties.

The St. of 1892, c. 216, entitled "An Act to incorporate the town of West Tisbury," requires an equal division of the corporate property.

PETITION to the Superior Court, under St. 1892, c. 216, § 5, for the appointment of commissioners to hear the parties and determine certain matters of difference between them. The Superior Court appointed three commissioners, who made their award, and a hearing was afterwards had on a petition for the acceptance of the award, the respondent town having filed a petition to have the report recommitted, before *Hopkins*, J., who found and ruled as follows:

"As to that part of the report of the commissioners which related to the division of the property of the town of Tisbury, I was of opinion that the commissioners erred, as matter of law, in ruling that the town of Tisbury is entitled to seven tenths thereof and the town of West Tisbury to three tenths thereof, and was of opinion that the said towns were each entitled to one half of said property; and that the award should" be amended accordingly, and as so amended the judge was of opinion that the award should be accepted, and so ordered.

By consent of the parties, the respondent town by such consent not waiving its right to insist that the judgment of the Superior Court was final and could not be reviewed by the Supreme Judicial Court, the judge reported the case for the consideration of this court. If, as matter of law, the corporate

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property should be divided between the towns equally, then the order accepting the award as amended was to stand as the final order of the court; otherwise, the award of the commissioners was to be accepted.

W. Clifford, for the respondent.

H. M. Knowlton & M. G. B. Swift, for the petitioner.

ALLEN, J. The respondent contends that the Superior Court had no authority to report the case, and that its decision is final. In construing a statute in some respects similar, it was held that there was no right of appeal from the decision of the Superior Court accepting an award of commissioners. *Cottage City* v. *Edgartown*, 134 Mass. 67. The question in the present case is as to the construction of the statute providing for the division of the corporate property, and this is a question of law; and we think the case falls within the general rule contained in Pub. Sts. c. 153, § 6, that the court, after verdict or decision, may report the case for determination by this court. The recent case of *Newburyport Water Co.* v. *Newburyport*, 168 Mass. 541, arose under St. 1894, c. 474, which provided in § 1 for a valuation of property by three commissioners to be appointed by this court, whose award when accepted by the court was to be final; and questions arising under their award were reserved by a single justice of this court, and entertained by the full court. The question of the power to make such reservation was not discussed, but we think questions of law arising upon an award may be reserved or reported, under general provisions of statute, although the statute under which the commissioners are appointed provides that their award, when accepted by the court, shall be binding on all parties.

The petitioner contends that the corporate property should be divided in the proportion of seven tenths to Tisbury and three tenths to West Tisbury, that being the proportion in which the net debt is divided. We are unable so to construe the statute. It was not necessary for the Legislature to observe the same proportion between the property and the debt. The Legislature might make such provisions as it saw fit in relation to the division of the property and the burdens. Many considerations might influence their action in determining what would be most just and reasonable in these respects, and the probable future cost

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to each on account of roads, schools, paupers, and other public burdens, might have some weight. Looking at the statute in detail, (St. 1892, c. 216,) it appears that in certain particulars the Legislature made a division in the proportion of seven tenths to Tisbury and three tenths to West Tisbury (see §§ 2, 3, 4, 8), while in certain other respects this proportion was not observed (see §§ 9, 10, 11). In § 5, which relates specially to the matter now in controversy, it is provided that the two towns shall retain and own the corporate property heretofore owned by the town of Tisbury which is within their respective limits, however the same may have been acquired, "subject to such payment in cash from one town to the other, to equalize the value of corporate property in the towns after division, as may be determined and apportioned by the commission; . . . and the net public debt of said town of Tisbury, after deducting all cash assets of and debts due to said town of Tisbury, shall be divided between the towns of Tisbury and West Tisbury in the ratio of seven tenths to Tisbury and three tenths to West Tisbury; and in case the town of West Tisbury cannot agree with the town of Tisbury as to the amount of debt which it is to assume under this section, or as to the amount of cash payment to be made to equalize the value of corporate property, said amount shall be determined by three commissioners," etc. The phrase "to equalize the value of corporate property" is used twice, and we are unable to give to these words the meaning contended for by the petitioner, namely, that they mean to equalize the proportion of corporate property in the ratio of seven tenths to Tisbury and three tenths to West Tisbury. The order of the Superior Court must therefore be affirmed.

So ordered.

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AMOS W. LOCKE *vs.* ALEXANDER KENNEDY.

Middlesex. January 10, 1898. — May 20, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Pleading — Lease — Motion to amend before the Full Court.

In an action on a written lease for rent, allegations that the indenture bore a certain date, that the term was for three years from that date, and that the unpaid rent which the defendant owed was for seven months from that date, are descriptive averments; and, if not proved as laid, a verdict is rightly ordered for the defendant.

In an action on a written lease for rent, a motion to amend the declaration at the hearing before the full court, so that the plaintiff will not be prevented from recovering by failure to prove that the day alleged was the exact date of the lease, is one with which the court has no power to deal, but which the plaintiff may renew in the court below, if he shall see fit.

CONTRACT, for rent, under a written lease. Trial in the Superior Court, before *Mason*, C. J., who held that there was not sufficient evidence to warrant a verdict for the plaintiff as his case was presented by the declaration, and directed a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

A. J. Lathrop, for the plaintiff.

A. S. Hudson, for the defendant.

BARKER, J. The ruling excepted to was that there was not sufficient evidence to warrant a verdict for the plaintiff as his case was presented by the declaration. There is no contention that this ruling was not correct, so far as it applied to the second count, which was for goods sold and delivered, the plaintiff admitting at the trial that he had been paid for the goods.

The first count was for rent, and alleged "that the defendant entered into an indenture under seal and bearing date November 13th, A. D. 1893, whereby said plaintiff demised and leased for the term of three years from the said November 13, 1893, to the defendant a certain tenement, namely, the Locke Farm in Lexington, Mass. The defendant covenanted to pay the plaintiff the sum of one thousand dollars for the three years' occupancy, in monthly payments at the rate of twenty-seven and seventy-eight one-hundredths dollars per month for each and

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every month. But the plaintiff says that the defendant has not kept his covenants, but has neglected to perform the covenants mentioned, and that he has not paid said rents for seven months succeeding the said November 13, 1893, to the damage of the plaintiff, as he says, to the amount of one hundred and ninety-four and forty-six one-hundredths dollars."

The evidence showed that there had been an indenture of lease in two parts, one part of which had been destroyed by fire and the other part lost. There was no dispute that the premises leased had been occupied by the defendant under the lease, or as to the amount of the monthly rent, or that the term was three years from the date of the lease, or as to the date up to which the defendant had occupied the premises. The plaintiff testified that he was unable to fix the date of the lease more definitely than that it was in November, 1893, and before the middle of that month. He also testified that on the fifteenth day of each month succeeding November, 1893, he had demanded rent of the defendant, and that the latter had answered that he had no money to pay rent then. The defendant testified that the terms of the indenture were as testified to by the plaintiff, and that he had paid no rent.

It is plain that, while this evidence would justify a finding that the defendant owed the plaintiff for rent under a written lease the sum alleged to be due in this count, it would not warrant a finding that the lease bore date November 13, 1893, or that the term was for three years from that date, or that the unpaid rent was for seven months succeeding that date. While the evidence did not show a variance, it did not prove the allegations of the count as they were laid. It is yet the rule that material descriptive averments must be proved as laid, and the allegations that the indenture bore date November 13, 1893, that the term was for three years from that date, and that the unpaid rent which the defendant owed was for seven months from that date, were descriptive averments, which identified the contract sued on, and which must be proved as laid to enable the plaintiff to recover upon the count as the declaration stood. *Stanwood* v. *Scovel*, 4 Pick. 422. *Whiting* v. *Withington*, 3 Cush. 413. This objection to the plaintiff's recovery could easily have been removed by an amendment. *Birnbaum*

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v. *Crowninshield*, 137 Mass. 177. The ruling excepted to, that there was not sufficient evidence to warrant a verdict for the plaintiff as his case was presented by the declaration, was well calculated to suggest to the plaintiff that he should ask leave to amend the count, and as the case stood was correct in law, so that the exception to it must be overruled.

The plaintiff moved to amend at the hearing before the full court, so that he would not be prevented from recovering by failure to prove that the exact date of the lease was November 13, 1893. This motion is one with which we have no power to deal, but which the plaintiff may renew in the court below, if he shall see fit. *Exceptions overruled.*

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MARY A. RYDER *vs.* WILLIAM H. FAXON & others.

Plymouth. January 19, 1898. — May 20, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Evidence — Agreement as to Building on Leased Land remaining Personal Property.

Evidence tending to show an agreement between the lessor and the lessee, outside of the lease, that a building on the premises should be and remain the personal property of the lessee, is rightly admitted; and such agreement is not inconsistent with a phrase following the description of the land, "to be occupied by a building erected thereon by said R.," the lessee, or with a covenant that at the termination of the lease the lessee should deliver up the premises in as good order and condition as they then were or should be put into by the lessor.

Where a lease itself shows the lessor's assent that the lessee should erect a building, evidence that the lessor directed that it should be so built that it could be moved when the lease expired, that he made no reply when told by the lessee that he would have to mortgage the building to pay for it, and that the lessor told the lessee that he did not want him to put up any wall or anything that would obstruct the place, justifies a finding that there was an agreement that the building should be the personal property of the lessee.

TORT, for the conversion of a wooden hotel building. Trial in the Superior Court, without a jury, before *Wardwell*, J., who found for the plaintiff; and the defendants alleged exceptions, which appear in the opinion.

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R. O. Harris, for the defendants.

F. M. Bixby, for the plaintiff.

BARKER, J. The first lease was made on March 1, 1883, for the term of three years from that date. At the beginning of the term the demised premises were a vacant parcel of land, upon which the lessee thereafter erected a two story hotel building. On March 1, 1884, the lease was cancelled, and a new lease made for the term of five years from that date. On February 26, 1886, the building, which was set on posts, was destroyed by fire. On March 1, 1886, the second lease was cancelled, and a new lease made for ten years from that date, after which a new building, upon the old foundations and having no cellar, was erected by the lessee. In 1894 the lessee made a bill of sale of the building to a third person, who in turn made a bill of sale to the present plaintiff, who is the wife of the lessee. Before the third lease expired the lessor died, and on the expiration of the lease his heirs, the present defendants, took possession of the land and building, and refused to allow the plaintiff to remove the building, whereupon she brought this action for conversion of the building, claiming under her bill of sale.

1. At the trial the defendants excepted to the introduction of evidence tending to show an agreement between the lessor and the lessee, outside of the lease, that the building should be and remain the personal property of the lessee. This evidence was rightly admitted. When the lease of 1886 was made, the premises were simply land upon which were certain posts that had served as the foundations of a building which had been destroyed by fire, and which might serve as the foundations of another building. The phrase following the description of the land, "to be occupied by a building erected thereon by said Ryder," is not inconsistent with an agreement that the building should be the personal property of the lessee; nor is the covenant that at the termination of the lease the lessee should deliver up the premises in as good order and condition as they then were or should be put into by the lessor inconsistent with such an agreement. The removal of personal property from the land would be neither waste nor an alteration, within the meaning of the clauses of the lease which relate to those subjects. So an agreement outside the lease that the building to be erected should be the

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personal property of the lessee was not in contradiction of the terms of the written lease, and there is nothing which requires such an agreement to be in writing. Evidence tending to show such an agreement was therefore admissible.

2. The defendants contend that the evidence was not sufficient to establish the agreement. If we assume that this question is open under the request that upon all the evidence the plaintiff could not recover, we think the contention is unsound. Whether fixtures placed by a lessee upon leased land thereby become part of the realty is not altogether matter of agreement between the lessor and lessee. The intention of the latter has much to do with the question, and if his intention is that the fixture shall remain his personal property, and that intention is made known, and his acts are consistent therewith, the fixture may remain his personal property, although there may be no agreement to that effect between him and the lessor. *Hopewell Mills* v. *Taunton Savings Bank*, 150 Mass. 519, and cases cited. In *Madigan* v. *McCarthy*, 108 Mass. 376, the building was put upon stone foundations with a cellar, and as and for a permanent dwelling-house, without the consent of the landowner, or any contract with him, express or implied, that the tenant should hold it as personal property. In the present case the lease itself shows the lessor's assent that the lessee should erect the building, and the evidence that the lessor directed that it should be so built that it could be moved when the lease expired, that he made no reply when told by the lessee that he would have to mortgage the building to pay for it, and that the lessor told the lessee that he did not want him to put in any wall or anything that would obstruct the place, justified a finding that there was an agreement that the building should be the personal property of the lessee.

The exceptions to the refusal to rule that the lessor's surrender of the prior leases took away his right to remove the building, and that the right was at an end because of breaches of the conditions as to the sale of liquor and as to non-payment of rent, have not been argued, and we do not consider them.

Exceptions overruled.

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JOHN IMBESCHEID *vs.* OLD COLONY RAILROAD COMPANY.

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Suffolk. January 20, 1898. — May 20, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Eminent Domain — Damages — Interest from Date of Taking.

Where the owner of land and buildings retains possession after the taking by a railroad corporation conformably to law, the rights of the parties growing out of that possession are not to be settled in the proceedings for damages occasioned by the taking; and the owner is entitled to interest from the time of the taking to the date of the verdict.

PETITION, for an assessment of damages occasioned to the land and buildings of the petitioner in Boston by a taking by the respondent, under St. 1892, c. 433, entitled "An Act relating to the abolition of certain grade crossings of the Boston and Providence Railroad," and St. 1893, c. 126, entitled "An Act in relation to raising the grade and changing the location of the Providence Division of the Old Colony Railroad in the city of Boston."

Trial in the Superior Court, before *Dewey*, J., who ruled that the petitioner was entitled to interest from the date of the taking, and, after a verdict for the petitioner, reported the case for the determination of this court. If the ruling was right, judgment was to be entered upon the verdict; otherwise, interest upon the damages awarded was to be deducted from the amount of the verdict, and judgment was to be entered for the remainder. The facts appear in the opinion.

J. H. Benton, Jr., for the respondent.

R. M. Morse, (*T. F. Meehan* with him,) for the petitioner.

BARKER, J. The verdict is for damages assessed at the sum of $17,478.40 as of the day when the land and buildings were taken, and for an added amount for interest from the time of the taking to the date of the verdict. The petitioner refused to vacate the land and buildings when requested, after the taking, and continued to use and enjoy them for a year, and gave them up only when the respondent brought against him a bill in equity founded on the taking and the petitioner's refusal to give up possession. The question presented by the report is whether,

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under these circumstances, the petitioner can recover in the present proceedings interest from the date of the taking.

The petitioner's loss of title occurred at the date of the taking. His compensation was then due, and his right to recover it with interest from that date is settled. *Parks* v. *Boston*, 15 Pick. 198, 208. *Reed* v. *Hanover Branch Railroad*, 105 Mass. 303. *Hampden Paint & Chemical Co.* v. *Springfield, Athol, & Northeastern Railroad*, 124 Mass. 118. *Old Colony Railroad* v. *Miller*, 125 Mass. 1, and cases cited. *Chandler* v. *Jamaica Pond Aqueduct*, 125 Mass. 544, 550. *Bancroft* v. *Cambridge*, 126 Mass. 438, 440. *Drury* v. *Midland Railroad*, 127 Mass. 571, 585. *Sherwin* v. *Wigglesworth*, 129 Mass. 64. *New York & New England Railroad* v. *Drury*, 133 Mass. 167. *Frazer* v. *Bigelow Carpet Co.* 141 Mass. 126. *Sawyer* v. *Boston*, 144 Mass. 470.

From the date of the taking the petitioner's possession was no longer that of an owner, but of an occupant in possession, without right and against the defendant's right. Of whatever value this actual possession without right may have been to the petitioner, or whatever damage it may have caused to the defendant, it is immaterial to the present case. The statute makes no provision that such an occupation shall be considered in reduction of damages, or set off against interest. In many instances the whole of an owner's land is not taken, and the damages have regard not only to the value of the land taken but to the effect of the taking upon the value of other lands of the same owner. It is important to have a definite rule for their assessment, and one as simple as may be. The rule adopted leaves upon one side, unless perhaps where it is admitted that there has been a definite agreement of the parties to the contrary, all questions growing out of the occupancy of the premises by the former owner after the date of the taking, as well as all questions of agreement as to the mode of use of the property or rights acquired under the taking, and awards compensation upon the theory that the owner is to be paid for what is the legal effect of the taking, his damages assessed as of its date, and with interest because the damages were not paid when due. *Old Colony Railroad* v. *Miller*, 125 Mass. 1. *Gardner* v. *Brookline*, 127 Mass. 358, 364. *Howe* v. *Weymouth*, 148 Mass. 605, 607. *Googins* v. *Boston & Albany Railroad*, 155 Mass. 505.

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Roberts v. *Cambridge*, 164 Mass. 176, 180. *New York, New Haven, & Hartford Railroad* v. *Miller*, 165 Mass. 514. If, as in the present case, the owner retains possession after the taking, the rights of the parties growing out of that possession are not to be settled in the proceedings for damages occasioned by the taking.

Judgment on the verdict.

MICHAEL B. McGARRAHAN *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

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Suffolk. January 21, 1898. — May 20, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Personal Injuries — Railroad — Action — Damages — Law and Fact.

In an action against a railroad corporation for personal injuries occasioned to the plaintiff while a passenger on its train by having his leg forced through a window and being dragged along the ground under a car which had been derailed and tipped over, the defendant is not entitled to a ruling that it would not be liable for blood poisoning unless it was the ordinary effect of such a wound.

A person who has been injured in a railroad accident is bound to use due diligence to obtain proper medical treatment, and his duty in this respect is fully discharged by using ordinary care in procuring a reputable physician and in following his instructions; and the railroad corporation is not exonerated from liability for the results of the injury, although those results are more serious than if he had had better treatment.

In an action against a railroad corporation for personal injuries occasioned to the plaintiff by the defendant's negligence, it is for the jury to determine whether his condition at the time of the trial was the effect of the injury so received, and, if it was, the relation of cause and effect is such as to subject the defendant to liability, which is to be measured by what they shall find to be the effect of the injury.

Evidence that one who practises as a physician or surgeon attends a patient and gives him professional assistance justifies a finding that the services are rendered for a pecuniary recompense to be paid by the patient.

Evidence that a sick person is kept and cared for at a private house other than his home justifies a finding that he is there upon expense.

Evidence that a person has been engaged for two years in studying for a profession, and that he has been employed to do certain labor, taken in connection with his appearance and with testimony to the effect that he is permanently disabled by disease of the heart, is enough to justify a finding that his capacity to earn money has been lessened.

The jury are properly instructed that the plaintiff, in an action for personal injuries received in a railroad accident, is entitled to recover for his impaired capacity to earn money in the performance of manual or mental labor, and also the sum which he has properly expended in endeavoring to effect a cure,

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and that it is not necessary for him to prove the expenditure of any definite sum, but that the jury may use their own knowledge of the charges ordinarily made by physicians for their services in determining the amount to be allowed.

TORT, for personal injuries occasioned to the plaintiff by the alleged negligence of the defendant. Trial in the Superior Court, before *Blodgett*, J., who allowed a bill of exceptions, in substance as follows.

The defendant admitted its liability for any injuries to the plaintiff which were due to the accident hereinafter described.

The plaintiff testified, in substance, that on May 7, 1896, while he was a passenger on a train of the defendant, at about 7.30 P. M., the car in which he was riding, near its station in Boston, was derailed and tipped over; that the plaintiff was thrown against the back of the seat behind him, and then against the back of the seat in front, and then against the opposite side of the car, on which side the car tipped over and his left leg went through the window, and this side of the car, with his leg under it, was scraped along the ground for some distance; that he was unconscious for a time, and, when he recovered his senses, was put in a hack at the defendant's station and sent to the Emergency Hospital; that he stayed there under the direction of the doctors until they found time to examine him; that then one of them examined him and dressed his injured leg, and put a bandage on it; that he remained there about two hours, and from there he went outside and got a hack, as he was told at the hospital that they had no accommodations for him to stay over night, and he must find a place for himself; that his leg along the shin bone was cut and bruised, and the skin scraped off; that he then went to the home of a cousin in Readville; that on the next day he came to Boston about eight o'clock in the morning, for the purpose of going to the Massachusetts General Hospital for treatment, and on his way to the hospital stopped at the defendant's station, the scene of the accident, for the purpose of recovering property which he had lost at the time he was injured; and that while there his leg began to swell and pain him so much that he went to a house in Boston where a cousin lived, and went to bed and sent for a doctor.

Dr. Coxwell, called as a witness by the plaintiff, testified that he was called to attend the plaintiff some time during the day,

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and visited him at about six o'clock in the evening, on May 8, 1896; that he found a wound on the plaintiff's left leg, which was inflamed and tender, and in which blood poisoning had already set in; that the leg had an antiseptic dressing over the wound and a surgical bandage from the instep to the knee wound around the leg; that this bandage thoroughly protected the wound and supported the leg in case the patient used it; that the witness cleansed it and applied antiseptic dressing, and raised the leg; that the blood poisoning was probably due to the dirt, or glass, or rusty iron, or germs that entered the flesh at the time of the accident; that blood poisoning began immediately, and it was not possible at the time he examined the wound thoroughly to disinfect it; that erysipelas had set in, and the whole system was infected; that the plaintiff's head, right hip, pelvis, and lower part of the back were found to be injured; that his heart was examined with the stethoscope and found to be sound; that the witness visited him professionally up to the day of the trial; that periostitis of the left leg, which was a poisonous disease, set in a few days after the injury; that upon consultation with another physician, whom he called in on account of the plaintiff's dangerous condition, he decided to operate on the leg, and on May 16, 1896, he made an incision through the periosteum down to the bone; that after that he dressed the wound two or three times daily, as he did before; that, as a result of the poisoned condition of the wound, septic endocarditis set in, which produced organic lesions of the heart, and resulted in severe valvular disease of the heart; that the injury to the leg caused a shrinking of all the tissues of the leg, and weakened the limb, and this condition existed at the time of the trial; that there was an inflammation of the hip joint, a swelling of the joint, and the parts and ligaments surrounding it were swollen, that this inflammation increased during the first three weeks, continued for several months, and gradually subsided until the plaintiff got out of bed and went around on crutches; that since then the progress had been slower, and there was pain upon use in this joint, and would be for an indefinite time in the future; and that the pelvis was wrenched and sprained, and this condition was one of the reasons why he used a cane in getting about, and from which he would probably never recover.

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Upon cross-examination this witness, and several other medical witnesses, testified that blood poisoning was not an ordinary incident of wounds, if they were treated by antiseptic cleansing and dressing, or were cleansed and dressed in a proper manner.

The plaintiff testified that for two years previously to the injury he had been studying law in an office in Providence, Rhode Island, but he did not testify as to what the amount of his earnings were at any time.

A witness called by the plaintiff testified that he had employed him to make repairs on real estate a short time before the injury, and described what the plaintiff did.

There was testimony by Dr. Coxwell that he had attended the plaintiff some two hundred times during his illness.

There was also evidence that Dr. Coxwell had been surgeon to the Worthing Hospital in England for fifteen years, city physician of Worthing for eighteen years, and medical examiner for a number of large life insurance companies in London for twenty-five years; that he had practised medicine and surgery in England for twenty-seven years, and probably had between three thousand and five thousand cases a year; and that since April, 1893, he had been practising medicine and surgery in Boston.

Mary Young, who was the plaintiff's cousin, testified that he came to her house the day after the accident, and remained there five weeks; that he was confined to the bed all the time; that she took care of him during the first week; that his condition was very bad, and he got so she could not take care of him, and then she got a male nurse; and that he was delirious "most all night."

James J. Mulvey testified that he was a second cousin of the plaintiff; that he had known him ten or twelve years, and been in the habit of seeing him two or three times a year; that after the accident he took care of him at Mrs. Young's house, beginning after the first week, for four weeks; and that his condition nights was very poor, and when talking he seemed to be out of his mind.

Mrs. Lane testified that the plaintiff came to her house in June, 1896, and remained there until September 19, 1896; that she took care of him; that he was very ill during the first three or four weeks, and he was confined to his bed for several weeks;

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and that Dr. Coxwell arranged for him to come to her house, as the house in which he had been staying was sold and the inmates were ordered to leave it.

There was testimony that the plaintiff might live an indefinite period if he used proper care, but that he would never be able to work physically or mentally in the future, and would have to have medical attendance as long as he lived.

Dr. George H. Monks, a witness called by the defendant, testified that occasionally cases of periostitis develop after such injuries without any cause being apparent; that it was rather uncommon for periostitis to develop after a wound; that it might develop after such a wound as this was said to have been, as a result of the fact that the wound had not been kept or made surgically clean; and that that was the principal reason, or from the fact that the leg had not been properly rested.

The defendant requested the judge to rule as follows:

"1. If the jury find that blood poisoning was not the natural and ordinary consequence of the wound on the plaintiff's leg, but was due to improper or imperfect cleansing or dressing of the wound, the defendant would not be liable for the blood poisoning, or for its effect upon the plaintiff.

"2. It was the plaintiff's duty, having been injured, to use reasonable diligence to obtain suitable medical treatment, and if the treatment which he obtained was improper or negligently applied, or if the person giving such treatment was negligent in applying or omitting to apply proper treatment, the defendant is not liable for the consequences thereof.

"3. There is no evidence of what the plaintiff was earning at the time of the injury, or of what his earning capacity was, and the jury cannot award damages for the loss either of his earnings, or capacity to earn.

"4. There is no evidence that the plaintiff has been put to any expense by reason of his injuries, and the jury can award him no damages upon that ground."

The judge declined so to rule, and instructed the jury, among other things, as follows:

"The test whether the relation of cause and effect exists between two things — because that is the question here, whether the injury is the cause of the present condition of the plaintiff

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— is not whether such a condition of things as you may find now exists with this plaintiff commonly and ordinarily follows, but whether it does sometimes follow, and as a matter of common knowledge and experience may be expected sometimes, in rare cases possibly, to follow from an injury of that kind. The question for you is a practical one, whether, using language as it is ordinarily used and understood, the condition of the plaintiff to-day, for which he seeks to recover damages, was the effect of an injury received by him in May, 1896. If it was, then there is the relation of cause and effect such as to subject the defendant to liability for those consequences which ensued from the injury so received by the plaintiff.

"The burden is upon the plaintiff to satisfy you that the illness with which he is now afflicted, and from which it seems to be conceded by all the experts he will never entirely recover, is due to the injury received at the time when this accident occurred, either wholly or in part. If you find upon the evidence that he has sustained the burden of proof in this respect, and that his present physical condition is due wholly to the injury received at that time, then he is to be compensated by having what you say will afford reasonable compensation for his present condition. If upon the evidence you find that his present condition is not due wholly to the injury received, but that that condition of things existed in part before the injury, and still you are of the opinion that this particular trouble was aggravated and intensified by the injury, then so far as it was so aggravated — and the burden is upon the plaintiff to show you how far it was aggravated — he is to have damages only sufficient to compensate for the increase or aggravation of the illness in this respect. . . .

"What are those elements which ordinarily are to be considered by the jury in assessing damages in a case of personal injury? One of them is the impaired capacity to earn money in the performance of manual or mental labor, and of course in the determination of that question the jury must take into consideration the age of the plaintiff, his probable expectation of life, how far he has capacity to earn money as men ordinarily do in the performance of work which they are fitted or accustomed to perform, whether that work is physical or mental

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labor, and the jury must say how much the plaintiff should have by reason of this impairment of capacity in the use of physical powers to earn money.

"Then, again, the plaintiff is entitled to recover the sum which you find he has reasonably and properly expended in endeavoring to effect a cure. What he has reasonably paid for medical attendance and nursing and medicine, so far as the evidence in the case enables you to determine, in an attempt to effect a cure, he is entitled to recover in this case. And if the evidence shows that to some extent it would be necessary for him to incur similar like expenses in the future for medical attendance and nursing, he is to have that taken into consideration at the present time. . . .

"The plaintiff might have shown, had he seen fit to do so, what he had actually expended up to the present time, what liability he had actually incurred, and he might have offered evidence to show that the expense he had incurred up to the present time was reasonable and proper. But the plaintiff is not required to furnish so definite proof as that unless he sees fit to do it. There is evidence in the case as to medical attendance. Dr. Coxwell told you the number of visits he had made to the plaintiff for the purpose of treating him. There is no evidence as to what the ordinary charge for such a visit is. There is no evidence as to what the charges of Dr. Coxwell ordinarily are. . . . I must assume that you have some knowledge in common with men in general as to the charges ordinarily made by physicians for attendance and services such as you find upon the evidence in this case have been rendered, and you may avail yourselves of that knowledge for the purpose of determining what sum the plaintiff should have by reason of the expense he has properly and reasonably incurred in endeavoring to effect a cure.

"The contention of the plaintiff is that the heart disease, as existing at the present time, is fairly attributable to the injury. . . . And the plaintiff says that upon the evidence of the experts you ought to be satisfied that the present condition of the heart is due to that injury. There was the injury, then, as the plaintiff claims, of blood poisoning, and then different conditions of things finally resulting in the present condition of the

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plaintiff's heart, a condition which it is conceded incapacitates the plaintiff for the performance of ordinary work, and a condition from which it is conceded that there is not likely to be a recovery.

"Suppose that condition of things, the injurious results of blood poisoning might have been averted by proper medical treatment; it is the contention of the defendant, among other things, that the injury received did not naturally result in the condition of things now existing. In other words, that there is not the relation of cause and effect between the injury confessedly received in May of last year and the physical condition of the plaintiff to-day, and for a considerable time prior to the present time.

"It is said upon the evidence you may find, or ought to find, that he did not receive proper medical treatment, and that the poisoning by the entrance of germs into this wound might have been prevented by proper treatment. Suppose that to be so, how is the plaintiff affected? The plaintiff was required to use reasonable care in order to effect a cure; he must use reasonable care to secure proper medical and surgical treatment after he was injured; he must use that degree of care in respect to securing proper professional treatment that men of ordinary prudence and discretion do use in similar cases, and if in fact the plaintiff did use such a degree of care, he did all in the first instance that the law required him to do. If in the exercise of reasonable care he properly called in the services of Dr. Coxwell, then the plaintiff would not be responsible for the consequences of a mistake made by his attending physician, however serious that mistake might be. Suppose a case, one where upon the evidence you were satisfied that the condition of the plaintiff as it is to-day was due to the fact that he did not have from his attending physician or surgeon proper treatment, and that it was due wholly or mainly to that. Still, if the plaintiff in the selection of the physician or surgeon, and in compliance with the directions of his physician, was in the exercise of reasonable care, the defendant is still responsible in damages for the injurious results to the plaintiff of the injury, although those results are more serious than they would have been had he had better treatment."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

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C. F. Choate, Jr., for the defendant.

E. H. Pierce, (*W. L. Currier & D. H. Sheahan*, of Rhode Island, with him,) for the plaintiff.

BARKER, J. In the first request the court was in effect asked to rule that the defendant would not be liable for blood poisoning, unless it was the ordinary effect of such a wound. This was clearly wrong, and the instruction as requested was properly refused. The other matters embraced in it were properly treated in the charge.

The second request combined two rulings, one that the plaintiff must use due diligence to obtain proper medical treatment, which was good law, and another that if the treatment which he did obtain was improper the defendant would not be liable, which was wrong. The plaintiff's duty in this respect was fully discharged by using ordinary care in procuring a reputable physician, and the same care in following his instructions. The second request was therefore properly refused. Nor was there any error in the instructions given upon the matters embraced in these requests. Upon the first, the jury were properly told that the question for them was a practical one, whether, using language as it is ordinarily used and understood, the condition of the plaintiff at the time of the trial was the effect of the injury which he received upon the occasion of the accident, and that if it was, that there was such a relation of cause and effect as to subject the defendant to liability. There was no evidence that there was improper medical treatment. The whole foundation for such a contention was the fact that certain medical witnesses testified that blood poisoning was not an ordinary incident if wounds were dressed in a specified manner, but there was no evidence that blood poisoning was not a natural result of such an injury as that which the plaintiff received, and no evidence that the wounds which were inflicted on him were not skilfully and properly treated, and so nothing to call for an instruction to be separately given with reference to disabilities resulting from improper treatment. It was enough to limit the jury to giving compensation for what they should find to be the effect of the injury. So the instruction that if the plaintiff, in the selection of the physician or surgeon, and in compliance with his directions, was in the exercise of reasonable care, the defend-

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ant was still responsible in damages for the results of the injury, although those results are more serious than if he had had better treatment, was correct, and was all that was required by this branch of the case.

Jurors take with them their knowledge and experience of affairs, and are not only at liberty to use, but ought to use, that knowledge and experience in drawing conclusions from the evidence. Evidence that one who practises as a physician or surgeon, attends a patient, and gives him professional assistance, justifies a finding that the services are rendered for a pecuniary recompense to be paid by the patient. Evidence that a sick person is kept and cared for at a private house other than his home justifies a finding that he is there upon expense. Evidence that a person has been engaged for two years in studying for a profession, and that he has been employed to labor, taken in connection with his appearance and with testimony to the effect that he is permanently disabled by disease of the heart, is enough to justify a finding that his capacity to earn money has been lessened. All the requests upon these aspects of the case were properly refused, and the instructions given were right.

Exceptions overruled.

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ELLEN M. BAKER & others, trustees, *vs.* Z. ADAMS WILLARD & another, trustees.

HARRIET N. LOWELL *vs.* SAME.

Suffolk. January 27, 28, 1898. — May 20, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Equity — Obstruction of Easement.

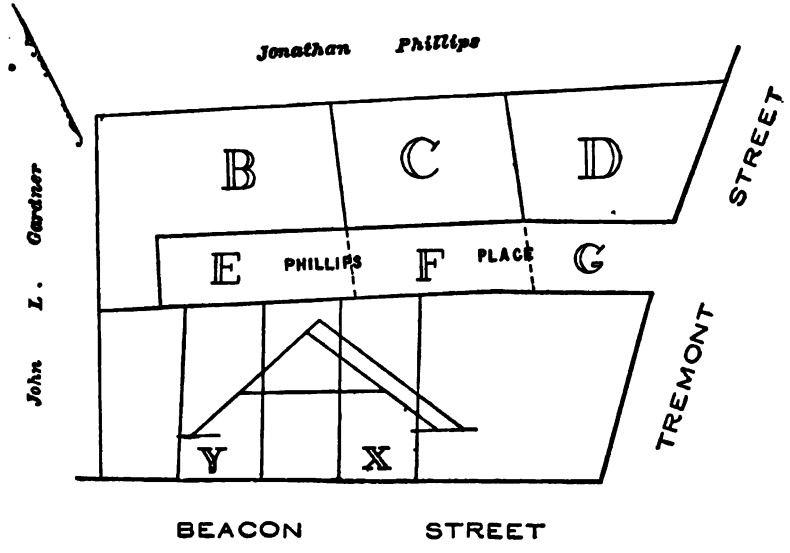
A. owned a mansion house, the land appurtenant to which was bounded easterly by T. Street, southerly by B. Street, and northerly by an open court about twenty feet wide, extending to his western boundary, and also owned by A. On the northerly side of the court he owned three dwelling-houses, facing southerly, and occupied by his married daughters. His mansion house, having an ell extending westwardly, stood about three feet from the court, separated from it by a fence six feet high, in which was no opening. Five windows of the mansion house opened on the court, in which was a drain used by all four

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houses. At his death A. devised the three dwelling-houses on the court to his daughters severally in fee, with the "respective privileges and appurtenances by them at the day of the signing of this will respectively occupied and improved," and devised his mansion-house to his wife for life, remainder to his son W., subject to the condition that they should personally occupy the same, "it being my design that the family establishment shall continue as much as possible unchanged," and the residue of his estate, including the open court, equally to his children. A.'s son W. having died, the mansion-house estate was conveyed by his administrator to D., who subdivided the estate, and conveyed two of the lots created by such subdivision and fronting on B. Street to E. and F. The lots owned by E. and F. both bounded northerly on the open court, and both were west of the most westerly of the windows of the mansion-house, which, before its removal, had opened on the court, and no other buildings formerly standing on the mansion-house estate had depended on the court for light or air. The owners of the open court and of the land devised to A.'s daughters proceeded to erect a building over the court, leaving open only a covered foot passageway, and thereupon E. and F. sought to restrain such erections. *Held*, that the testator A. created no further easement in respect to keeping the court open above the surface of the ground than the ordinary easement of light and air for the benefit of the mansion-house estate, and that this easement was limited to the mansion-house itself, and did not extend to the land owned by E. and F.

An administrator who, under leave of the Probate Court, conveys land of his intestate, bounding it "in part on a court," which was owned by his intestate with others as tenants in common, does not create by estoppel a right to have the court left open.

TWO BILLS IN EQUITY, filed April 17 and 24, 1896, respectively, by the owners of two parcels of land on Beacon Street in Boston, marked X and Y on the plan given below, to restrain



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the defendants, who, as well as the plaintiffs, derived their title through successive conveyances from Samuel Eliot, who died in 1820, from obstructing the light and air over a certain passage-way leading off of Tremont Street, or from erecting buildings over the same.

The case was referred to a master, and on the coming in of his report was heard on the pleadings, master's report, and exhibits, by *Allen*, J., who, at the request of the parties, reserved the case for the consideration of the full court. The material facts appear in the opinion.

L. S. Dabney & E. W. Hutchins, (*L. I. Partridge* with them,) for the plaintiffs.

S. Lincoln & W. A. Munroe, (*H. H. Sprague* with them,) for the defendants.

ALLEN, J. We will consider in the first place the nature and extent of the supposed original right which the plaintiffs respectively seek to establish. This right had its origin in the provisions of the will of Samuel Eliot, who died in 1820. He was the owner of the estate in Boston on the corner of Beacon and Tremont Streets, bounding south on Beacon Street, and east on Tremont Street. His mansion-house faced on Tremont Street, and the land immediately connected with it was bounded southerly by Beacon Street, and northerly by an open court or space about twenty feet wide, and extended westerly to his boundary line. On the northerly side of the open court or space he had built three brick dwelling-houses, which faced southerly, and were then occupied respectively by three of his daughters, with their husbands. Mr. Eliot's mansion-house stood about three feet south of the southerly line of the court, having an ell which extended westwardly on the same line with the mansion-house. Five of the windows of the mansion-house looked upon the court, and two rooms were entirely dependent on these windows for light; but there was no entrance or communication between the mansion-house estate and the court, there being between them a fence six or seven feet high, in which there was no opening. There was a drain through the court, which was used for all the four houses.

Mr. Eliot by his will devised to the said three daughters, "severally and respectively, the brick dwelling-houses and their respective privileges and appurtenances by them at the day of

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the signing of this will respectively occupied and improved, each to have and to hold their houses and estates thereto belonging now in their occupation, to them, their heirs and assigns forever." He devised the mansion-house estate as follows: "It is my will that my wife Catherine Eliot and my children who may reside with her shall have the use of my present mansion-house, and also the free use of all my plate, furniture, stores of every description in the house, and my horses and carriages, for their full enjoyment, without being responsible for any loss, consumption, or wear or injury of the same to my other children, it being my design that the family establishment shall continue as much as possible unchanged. The said devise of the mansion-house to my wife for life is on the condition that she shall continue to reside therein personally as the mistress thereof. . . . I give the reversion thereof to my son William Havard Eliot, his heirs and assigns forever." After sundry other bequests and devises, not here material, he devised all the residue of his estate equally to his children, of whom there were seven. The will contained no specific devise of the land between the three dwelling-houses and the mansion-house estate. At that time, as found by the master, the preservation of the space between the mansion-house and the three new brick houses as an open court was important, if not indispensable, to the convenient and accustomed enjoyment of the mansion-house in respect of light and air, so long as the mansion-house should be continued in the state and situation in which it then was.

On October 20, 1829, the widow of Samuel Eliot died, and William H. Eliot thereupon became, under his father's will, the owner in fee of the mansion-house estate, subject to the condition that he should personally occupy the same. By mesne conveyances the title to the westerly brick dwelling-house had come to Timothy H. Carter, who erected a building upon the westerly portion of the court; and William H. Eliot thereupon brought a writ of entry against him to recover one seventh part of the land. This case went to the full court, and by the decision, reported in 12 Pick. 436, it was held that the fee of the court did not pass to the testator's three daughters under the devise of the three dwelling-houses, but to his seven children under the general residuary clause. This decision was given on April 6, 1832, as we infer from the date in the margin of the volume.

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In the opinion, the court, in speaking of the open space, says: "There are some considerations which have led us to the conclusion, that it was the intention of the testator to devise an easement and not a fee. He manifested in his will a great attachment to the mansion in which he had long lived, and a strong desire that it should be continued in the state and situation in which it then was. The preservation of the space between that and the three new brick houses, as an open court, was important if not indispensable to the convenient and accustomed enjoyment of the mansion-house. . . . We cannot by possibility believe that the testator intended to devise the upper houses without a right of way to the street. . . . We are of opinion that it was the intention of the testator to preserve an open court there for the benefit and convenience of the adjoining houses, to give the respective owners thereof an easement in the court for various purposes." *Eliot* v. *Carter*, 12 Pick. 436, 442.

It was also then agreed, (and the same fact is found and reported in the present case by the master,) that the court was never used by the testator as a passageway to his mansion-house estate, nor in any other way in connection with it, except for light and air for the windows, and for the drain. The right of drainage is now immaterial.

It is thus apparent that it was then considered that by the will of Samuel Eliot some easement or right in respect to light and air from the open space was annexed to the mansion-house estate, but the extent of it was not defined in that decision. The present plaintiffs contend that it was something more than the ordinary easement of light and air for the windows and doors of existing buildings, and that it amounted to a general right to have the space kept open for the whole extent of the court as it then was.

There is no doubt that under some circumstances provision may be made by owners of land for keeping certain spaces open generally, for light, air, prospect, and other purposes of convenience and enjoyment, without attaching this right to particular buildings. Open squares may be dedicated to public purposes. *Abbott* v. *Cottage City*, 143 Mass. 521. And in making plans for the improvement and development of lands, provision is often made for keeping certain spaces open; of which illustrations may be found in *Brooks* v. *Reynolds*, 106 Mass. 31,

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Salisbury v. *Andrews*, 128 Mass. 336, and in numerous other reported cases. So that the question is, What was the testator's intention in this case? Such a restriction is to be interpreted according to the apparent purpose of protection or advantage to the several estates concerned. *Smith* v. *Bradley*, 154 Mass. 227. *Hano* v. *Bigelow*, 155 Mass. 341.

In the present case, we find no satisfactory evidence to show that the testator sought to create any further protection or advantage to the mansion-house estate, in respect to light and air, than the ordinary easement of that kind. It does not appear that he had any further building scheme in mind, or that he contemplated the cutting up of his mansion-house estate into separate lots. What he had at heart was, as expressed in his will, "that the family establishment shall continue as much as possible unchanged." The court in *Eliot* v. *Carter*, 12 Pick. 436, mentions as significant his strong desire that the mansion "should be continued in the state and situation in which it then was." No intention is manifested to provide for the benefit of additional buildings to be thereafter erected. So far from making any provision for light, air, or prospect for future structures, he left the easement in favor of his existing dwelling to be gathered from implication. He speaks of his mansion-house, but says nothing in express terms of the land connected with it except in one instance he mentions the "house and land thereto properly belonging." His interest attached to the dwelling place as it was, and he made no provision looking to its division into separate building lots. The plaintiffs have failed to show an intention on the part of the testator to create any further easement, in respect to keeping the court above the surface of the ground open, than the ordinary easement of light and air for the benefit of the mansion-house estate as it then was. *Leech* v. *Schweder*, L. R. 9 Ch. 463, 473.

We have then to consider whether the plaintiffs are entitled to the benefit of such an easement, assuming for the present that the easement in its original extent has not been extinguished by merger or otherwise.

William H. Eliot having died, his administrator, under leave of the Probate Court, conveyed the mansion-house estate in 1838 to Israel Thorndike. In this deed, the land conveyed was

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bounded northeasterly "in part on a court called Phillips Place." It is suggested in argument that these words created by estoppel a right to have the court kept open. But this deed was made by an administrator, who was selling land under a license of the Probate Court. He was not at that time selling the testator's interest in the open court, and perhaps he never would do so. We are not aware that it has ever been held that under such circumstances an administrator could impose an easement on other land which he was not then selling, nor under the circumstances do we think that an intention to create such an easement should be inferred. Moreover, even assuming that the administrator had all the powers of the testator, the latter at his death owned only one undivided seventh part of Phillips Place, and, he being only a tenant in common, could not have created such an easement without the consent of his cotenants. *Clark* v. *Parker*, 106 Mass. 554. See also Jones, Easements, § 224, and cases there cited.

The estate was subdivided by Thorndike, who in 1835 conveyed the lot now owned by Mrs. Lowell, one of the present plaintiffs, by deed to Stowell. This lot is now No. 2 Beacon Street, rectangular in shape, and has twenty-six feet front on Beacon Street. The easterly boundary line is about sixty-three feet west of Tremont Street at the front, and somewhat farther at the rear. The lot now owned by the other plaintiffs is No. 4 Beacon Street, lying westwardly from Mrs. Lowell's lot and separated by an intervening lot; and this lot was also conveyed by Thorndike in 1835 to a different purchaser, Lovejoy. The ell of the mansion-house reached back at least nearly to the easterly line of what is now Mrs. Lowell's lot, and perhaps extended a very few feet over that line, it being impossible now to determine exactly where the westerly wall of the ell stood. All the windows which looked upon the court were, however, east of the boundary of that lot. The stable and other outbuildings stood farther back from the court, and it does not appear that they depended on the court for either light or air. Upon these facts, it is quite obvious that the easement of light and air was limited to the mansion-house. This easement does not exist in favor of a vacant piece of ground, unless by virtue of provisions or circumstances clearly showing an intention to that effect. We need not now go nicely into the question of the

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exact rules for determining the measure of this right in favor of new structures, in cases where the original building has been pulled down or altered, (as to which see *Scott* v. *Pape*, 31 Ch. D. 554, and *Greenwood* v. *Hornsey*, 33 Ch. D. 471,) because the easement created in this case did not extend so far as to include either of the lots of land now owned by the plaintiffs. The plaintiffs contend that an easement appurtenant to a close is appurtenant to every parcel into which that close may be divided. This is usually so in respect to a right of way. *Whitney* v. *Lee*, 1 Allen, 198. Washb. Easements, (4th ed.) 59. But the doctrine is not applicable to an easement of light and air, which ordinarily is limited to windows and doors, or other apertures in a building. Gale, Easements, (6th ed.) 289, 290, 298–300, 506, 507. Goddard, Easements, (5th ed.) 51–53, 263–265, 289, 368. 2 Washb. Real Prop. (5th ed.) 362 *et seq.* Washb. Easements, (4th ed.) 493–501. If all other points are assumed in favor of the plaintiffs, they fail to show that any easement of light or air was created by the will of Samuel Eliot or otherwise, in favor of those parts of his estate which they now own. No such easement was necessary for the enjoyment of those parts of the estate, and an implied grant of an easement is not to be extended by construction beyond what was necessary, or what is fairly shown to have been within the intention of the creator of it. *Carbrey* v. *Willis*, 7 Allen, 364, 369. *Parker* v. *Bennett*, 11 Allen, 388, 392. *Badger* v. *Boardman*, 16 Gray, 559. *Jewell* v. *Lee*, 14 Allen, 145. *Sharp* v. *Ropes*, 110 Mass. 381. *Dalton* v. *Angus*, 6 App. Cas. 740. *Moore* v. *Hall*, 3 Q. B. D. 178. *Scott* v. *Pape*, 31 Ch. D. 554. *Harris* v. *De Pinna*, 33 Ch. D. 238. *Aldin* v. *Latimer*, [1894] 2 Ch. 437.

Thorndike's deeds to Stowell and Lovejoy each contained a grant of "the right of passage to and from the rear of said lot through Phillips Place to Tremont Street, which is guaranteed only for foot persons and of a width of not less than three and one half feet." The defendants admit that the plaintiffs respectively are entitled to this easement, but the plaintiffs have failed to show that they are entitled to have the passage kept open to the sky. *Burnham* v. *Nevins*, 144 Mass. 88, and cases there cited.

This view of the case being decisive in favor of the defendants, we do not consider the other questions argued.

Bills dismissed.

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JAMES W. DOON & another *vs.* INHABITANTS OF NATICK.

Middlesex. March 2, 7, 1898. — May 20, 1898.

Present: ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Abolition of Highways and Crossings at Grade — Damages — Eminent Domain — Right to use Land taken.

In abolishing a grade crossing under St. 1890, c. 428, the commissioners reported that "the location of C. Street remaining unchanged, said street shall pass over the railroad tracks by a suitable bridge at a height of not less than sixteen feet in the clear above the grade of said tracks hereinbefore ordered," and then, having stated requirements for the descent of the grade, for the construction of the abutments and superstructure of the bridge, etc., reported that the above street "shall be graded to its full width, and the roadway shall have a dressing of good gravel," etc. "The gravel may be sloped beyond the limits of said C. Street so far as may be necessary to hold the embankment, and for this purpose the right and easement to enter upon the following parcels of land, and to construct and maintain the necessary slopes thereon, is hereby taken." Then followed a description of the land so taken, and for which damages were sought to be recovered. *Held*, that the right or easement acquired by the taking was not only the right to slope the filling so far as it might be necessary to hold the embankment, but the right to use the land for purposes for which any land may be used over which a highway is located.

PETITION to the Superior Court for the assessment of damages sustained by the petitioners by the taking of land for changing the grade of Cochituate Street in front of their premises in Natick, for the purpose of abolishing the grade crossing of said street with the Saxonville Branch Railroad, so called, under the provisions of St. 1890, c. 428, and acts in amendment thereof. The crossing was abolished by the decision of the three commissioners appointed by the court on the joint petition of the selectmen of Natick and the directors of the Boston and Albany Railroad Company, which decision was duly confirmed, and the findings thereof adopted by the Superior Court.

At the trial in the Superior Court, before *Mason*, C. J., the respondent, at the close of the evidence requested the Chief Justice to instruct the jury that the only right or easement acquired in the petitioners' land by the taking was the right to slope the filling so far as it might be necessary to hold the embankment.

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and that the damages should be limited to the injury which such an easement would occasion to the land taken.

The Chief Justice refused so to rule, and instructed the jury that, under the taking, the respondent would have the right to make any use of the land which can be made of any land taken for a highway, and that the jury in assessing the damages might have reference to all uses to which land taken for a highway may be put; and the respondent excepted.

The jury returned a verdict for the petitioners; and the respondent alleged exceptions.

P. H. Cooney, for the respondent.

W. B. Sprout, for the petitioners.

KNOWLTON, J. In abolishing a grade crossing under the St. 1890, c. 428, the commissioners reported in regard to Cochituate Street, on which the crossing was, as follows: "The location of Cochituate Street remaining unchanged, said street shall pass over the railroad tracks by a suitable bridge at a height of not less than sixteen feet in the clear above the grade of said tracks hereinbefore ordered." Then follow requirements for the descent of the grade in each direction to the existing level, for the construction of the abutments and superstructure of the bridge, and for other details of construction. "The said Cochituate Street shall be graded to its full width, and the roadway shall have a dressing of good gravel," etc. "The gravel may be sloped beyond the limits of said Cochituate Street so far as may be necessary to hold the embankment, and for this purpose the right and easement to enter upon the following parcels of land, and to construct and maintain the necessary slopes thereon, is hereby taken. Said parcels are bounded and described as follows." Here follows a description of a certain parcel of land taken, as above set forth, from the petitioners, and for which taking damages are sought to be recovered in this proceeding. The question is whether the right or easement acquired by the taking was only the right to slope the filling so far as it might be necessary to hold the embankment, or the right to use the land for purposes for which any land may be used over which a highway is located.

The Legislature may authorize a tribunal taking land for a public use to take a fee, or any right or easement in land,

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according to the requirements of the use for which it is taken. Often discretion is given to the tribunal to take such an easement as they deem necessary. See St. 1895, c. 488, § 4. *Burnett* v. *Commonwealth*, 169 Mass. 417. The statutes which authorize the laying out of highways and town ways do not recognize the necessity or desirability of taking different kinds of easements for the construction of ordinary ways, but they provide for the location of ways over lands of private owners. A location under these statutes subjects the land to an easement for any kind of use which may be reasonably necessary for the construction and maintenance of the way. The easement created by such a location is the only easement which county commissioners, road commissioners, or other tribunals laying out highways and town ways under general statutes, can create. They may take land for a way. They cannot take land for any purpose less than for a way, whatever may be the particular kind of use to which they intend to put it.

The case of *Simonds* v. *Walker*, 100 Mass. 112, is like the case at bar in its principal features. The county commissioners laid out a highway and located it three rods wide by metes and bounds, and added, "from stone monument No. 8 to stake No. 14 all the land between the location of three rods wide and the Ashburnham road is taken for materials and slope." It was held that the land described in this last clause was within the location of the highway. It is said by Mr. Justice Hoar, giving the opinion of the court, that the commissioners "had no authority to take land beyond the limits of the location. . . . Looking at the record in this view, we find that it gives a laying out and location of the whole length of the road in Fitchburg, three rods wide, and goes on to say that for a certain part of the way an additional width, defined by metes and bounds, is 'taken for materials and slope.' How 'taken'? In the only way, most reasonably, in which it could lawfully be taken, — as a part of the road which they were defining. To say that it is taken 'for materials and slope' is only to give the reason why the road should be wider at that part than elsewhere." This case is decisive of the case at bar.

The rights of commissioners taking land under St. 1890, c. 428, are the same in this particular as the rights of county commissioners in laying out highways.

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In *Towne* v. *Newton*, 167 Mass. 311, no such question as that in the present case was raised by the exceptions or considered by the court. *Exceptions overruled.*

DANIEL O'DRISCOLL *vs.* ELIZA N. BRADFORD.

Middlesex. March 3, 1898. — May 20, 1898.

Present: ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Mechanic's Lien — Work done Colorably — Abandonment of Contract.

Work done upon a building for the purpose of enlarging the time for filing a claim for a lien, and not *bona fide* for the purpose of carrying out the contract, is not to be considered in fixing the time for the running of the thirty days within which the certificate must be filed.

At the trial of a petition for the enforcement of a lien on buildings and land, it appeared that the petitioner was employed by a sub-contractor to plaster the house and build the chimneys; that the petitioner substantially finished his work on May 20, at about which time the original contractor and sub-contractor abandoned their contracts; and that subsequently, on July 13 and 22, the petitioner patched some plastering in the house where it had been disturbed by joiners in putting on the finish. *Held*, that labor furnished after May 20 was not furnished under a contract made with the consent of the respondent, and that a certificate which was not filed until August 11 was not seasonably filed.

PETITION, to enforce a mechanic's lien. Trial in the Superior Court, without a jury, before *Hardy*, J., who found for the respondent; and the petitioner alleged exceptions. The facts appear in the opinion.

J. C. Ivy, for the petitioner.

C. R. Darling, for the respondent.

KNOWLTON, J. The judge who tried this case without a jury found as a fact that the labor furnished by the petitioner after May 20, 1896, was not furnished under a contract made by and with the consent of the respondent. The certificate on which the lien is founded was not filed until August 11, 1896, much more than thirty days after the petitioner ceased to perform and furnish labor with the consent of the respondent. The only labor done within thirty days prior to the filing of the certificate was for three hours on July 13, and for half an hour on July 22. This was done in patching plastering where it had

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be urbed by joiners in putting on the finish, and by pl . At the request of the respondent, the judge ruled th hat was done by the petitioner's workman on July 13th or . is not to be considered in fixing the time for the running of e thirty days if the petitioner had such work done for the purpose of enlarging the time for filing a lien claim, and not *bona fide* for the purpose of carrying out his contract." Except this patching, which was made necessary by the work of others afterwards, the plastering was all done prior to May 21. The evidence well warranted the finding that this work was done for the purpose of enlarging the time for filing the lien, and not *bona fide* under the contract. The giving of this ruling by the judge implied that he so found. If this was one of the findings of fact, it renders immaterial all the other questions in the case.

But as it does not expressly appear that the judge so found, and as he also ruled that "Delaney, Marquis, and Moseley having abandoned the work and their contracts prior to July 13th, the petitioner was not thereafter authorized to do further work on the house without further authority from the respondent, and any work done by him or his order on or after July 13th would not count in computing the time for filing his lien claim," it is necessary to consider this last ruling. It does not appear to be erroneous. By the terms of the contract of Delaney, the original contractor, under which the petitioner derived his authority to work, the whole house was to be completed on or before June 1, 1896. Marquis, the sub-contractor, contracted to have his part of the work done by the first day of May, and the petitioner, who made his contract with Marquis, was bound by that stipulation, as well as by the provision as to time in the original contract. The evidence showed that Marquis abandoned his contract at some time between the first and twentieth day of May, and Delaney abandoned his contract at about that time or a little later, and the respondent took possession of the building to complete it, independently of the contractors, before July 1st. Although it was not until July 22 that the petitioner was expressly forbidden by the respondent to do any more work, he knew all the time that the contracts of Marquis and Delaney had been abandoned, and that the respondent had taken posses-

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sion of the house. There was testimony that the respondent did not notify him earlier to do no more work there, because she supposed his part of the work had been finished a considerable time before. When the contracts of Delaney and Marquis were abandoned, and the respondent took possession of the building to complete it, the only authority under which the petitioner was working there was terminated. He was entitled to a lien for all that he had done up to that time, but work done after the original contractor and the first sub-contractor had lost their rights to continue the work through their failure to perform their contracts, and after the owner entered into possession for the purpose of completing the building on her own account, cannot be held to have been done with the owner's consent. *Worthen* v. *Cleaveland*, 129 Mass. 570, 576. The ruling upon this part of the case was correct.

Inasmuch as the petitioner lost his lien by a failure seasonably to file his certificate, the other questions in the case are immaterial. *Exceptions overruled.*

WILLIAM F. COPSON *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

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Middlesex. March 4, 1898. — May 20, 1898.

Present: ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Personal Injuries — Railroad — Passenger — Action — Inference of Due Care — Damages.

Evidence that the plaintiff in an action for personal injuries occasioned by a railroad accident went with a witness to take a train at a station on the defendant's railroad, that the witness did not see the plaintiff get on the train, as he was fifty or a hundred feet from him, but saw him "getting hold of the last rail of the car, and he must have got on the train," and "after the train had gone he looked to see whether he was there and did not see him," and that within a few minutes after the accident, which happened to the train about an hour later at another station, he was seen at the latter station by several passengers, will warrant a finding that the plaintiff was a passenger on the train at the time of the accident.

In an action against a railroad corporation for personal injuries received by the plaintiff while a passenger on the defendant's train at H., there was evidence that when he started on his journey he was in perfect health, and that he had

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always been in good health previously. There was testimony from numerous witnesses tending to show that he was in a peculiar mental condition at H. He had a wound on his hand, and one or two slight bruises on his head. The physician who attended him there testified that he was weak, trembling, nauseated, and in a cold perspiration, his pulse slow, and the pupils of his eyes were unusually dilated; that he seemed dazed, and refused to give his name. The evidence tended to show that his subsequent physical and mental condition was such that, at the time of the trial, it would have endangered his life to leave home and come to court; and that, if he could have been present, it would have been impossible for him to testify. *Held*, that the evidence warranted a finding that the plaintiff's condition was caused by an injury received at the time of the accident.

An inference of due care on the part of the plaintiff in an action for personal injuries received in a railroad accident is justified from evidence of the conductor of the train on which the plaintiff was a passenger, that he went through the train and took up the tickets of the passengers seven times between the station where the plaintiff entered the train and the place of the accident, that all the passengers had paid their fares before the accident, and that he did not remember seeing the plaintiff.

No exception lies to the allowance by the judge, sitting without a jury, in an action for personal injuries received in a railroad accident, in assessing damages, as compensation for the loss of ability to earn money, a sum equivalent to the present worth of an annuity of fifteen hundred dollars for ten years, computing interest at four per cent.

TORT, for personal injuries occasioned to the plaintiff while a passenger on the defendant's train. Trial in the Superior Court, without a jury, before *Blodgett*, J., who found for the plaintiff in the sum of $15,000; and the defendant alleged exceptions. The facts appear in the opinion.

C. F. Choate, Jr., for the defendant.

F. N. Wier, for the plaintiff.

KNOWLTON, J. The defendant excepted to the refusal to rule that the plaintiff could not recover. The defendant's passenger express train ran into the end of an accommodation train as it was on the point of moving away from the station at Hyde Park at about half past five o'clock in the afternoon of October 24, 1895. The occurrence of such an accident, unexplained, is some evidence of negligence of the defendant or its servants. *White* v. *Boston & Albany Railroad*, 144 Mass. 404. *Mahoney* v. *New York & New England Railroad*, 160 Mass. 573, 579. *Hennessy* v. *Boston*, 161 Mass. 502.

There was evidence to warrant a finding that the plaintiff was a passenger on the express train at the time of the accident. A witness testified that he was at Pawtucket, Rhode Island, on that

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day, and went with the witness to take a train for Boston which left at half past three o'clock, but was late for that, although in time for the train which left at fifteen minutes or twenty-five minutes past four o'clock. The witness said that he did not see the plaintiff get on the train, as he was about fifty or a hundred feet from him, but saw him "getting hold of the last rail of the car, and he must have got on to the train," and that "after the train had gone he looked to see whether he was there and did not see him." Within a few minutes after the accident which happened to this train at Hyde Park, he was seen at the station there by several passengers. None of them knew him, but from their testimony and the testimony of other witnesses who saw him that evening at Lowell, where he resided, there can be little doubt in regard to his identity.

There was testimony that when he left Pawtucket on that day he was in perfect health, and that he had always been in good health previously. There was testimony from numerous witnesses tending to show that he was in a peculiar mental condition at Hyde Park. He had a wound on his hand and one or two slight bruises on his head. The physician who attended him there said that he was weak, trembling, nauseated, and in a cold perspiration, that his pulse was slow, and that the pupils of his eyes were unusually dilated. He seemed dazed, and refused to give his name. The evidence tended to show that his subsequent physical and mental condition was such that at the time of the trial it would have endangered his life to leave home and come to court, and that if he could have been present it would have been impossible for him to testify. The evidence well warranted a finding that his condition was caused by an injury received at the time of the collision at Hyde Park.

The defendant contends that there was no evidence that he was in the exercise of due care, inasmuch as no witness remembers seeing him from the time when he parted with his friend at Pawtucket until he was in the station at Hyde Park. But the conductor testified to going through the train and taking up the tickets of the passengers seven times between Pawtucket and Hyde Park, and said that all the passengers had paid their fares before the accident. He did not remember seeing the plaintiff. This is evidence tending to show that the plaintiff was in a

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proper place, and was conducting himself as careful passengers ordinarily do. Otherwise he would have been likely to attract the attention of the conductor, or of others on the train through whom the conductor would have received information of his conduct. There is a class of cases in which due care may be inferred from the absence of negligence, as well as from positive acts of diligence. *Mayo* v. *Boston & Maine Railroad*, 104 Mass. 137. *Maguire* v. *Fitchburg Railroad*, 146 Mass. 379, 384. *Mears* v. *Boston & Maine Railroad*, 163 Mass. 150. *Caron* v. *Boston & Albany Railroad*, 164 Mass. 523, 526. We are of opinion that the judge properly might infer from the evidence that the plaintiff was in the exercise of due care.

The defendant excepted to the finding of the judge in regard to the damages. If we assume that this exception is open to the defendant, we are of opinion that no question of law is involved in it. The presiding justice, who tried the case without a jury, put upon a paper a memorandum which indicated his view of the facts on which his assessment of damages was founded. The only part of the finding to which exception is taken is to the amount allowed as compensation for the loss of ability to earn money. This the judge fixed at a sum equivalent to the present worth of an annuity of fifteen hundred dollars for ten years, computing interest at four per cent. The computation on this basis does not indicate that the judge thought it gave an ascertained mathematical measurement of the damages for the loss of earning capacity. It involves estimates which, at the best, were uncertain and merely approximate. Neither the degree of future disability nor the time that disability would continue could be told except as a probability, nor could the income or rate of interest that a fixed sum awarded as damages could be made to produce for a long period of years be known. If these elements could be exactly ascertained, the rest would be only a matter of computation. The objection to the method adopted is not that the judge could not find as a fact that the plaintiff's loss of earning capacity would probably be equal in the aggregate to fifteen hundred dollars a year for ten years, although it would not be precisely the same each year, but that there was no evidence of the cost of an annuity of that amount for that length of time. The actual cost of an annuity in the market was immaterial, except

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as it might be evidence showing the opinion of experts as to the probable income which money will bring in the future. There was no reason to think that the plaintiff contemplated buying an annuity. A computation at a given rate of interest may be shown by experts, or may be made by the judge if he is sitting without a jury, or by the jury if they are competent to make it. It is no objection to a finding that a computation is made without the aid of mathematical experts. So too, the probable rate of income that a sum of money safely invested can be made to produce in the future may be estimated by a judge or jury from their general knowledge of investments, and of the condition of business, and of the probable uses to which property can be put. Every jury in assessing damages in certain classes of actions is at liberty to consider questions of this kind on their common knowledge, and without the aid of expert testimony. Whether in most cases sufficiently accurate data can be obtained to make such a method very helpful, we need not consider. That it is a legitimate method in those cases in which the tribunal assessing damages finds facts that make it applicable, we have no doubt.

Exceptions overruled.

EDWIN F. LAMSON *vs.* CHARLES F. VARNUM.

Middlesex. March 7, 1898. — May 20, 1898.

Present: ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Contract — Liability of Father for Debt of Minor Son — Exception.

At the trial of an action to recover for services as a dentist rendered to the minor son of the defendant, it appeared that the son, who was a boy nineteen or twenty years of age and lived in his father's family, went to the plaintiff while suffering from a toothache and had his teeth filled. After the services were rendered he told the plaintiff to make the charge to his father. There was evidence that twice during the lifetime of the minor the plaintiff sent a statement of his charge for the services to the defendant, and received no reply. Once a statement was sent by mail, postage paid, with a request printed on the corner of the envelope to return to the plaintiff if not called for within five days, and this letter did not come back to the plaintiff. The jury returned a verdict for the plaintiff. *Held*, that the defendant had no ground of exception to the refusal of the judge to rule "that upon all the evidence the plaintiff was not entitled to recover."

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CONTRACT, to recover for services as a dentist, rendered to the minor son of the defendant. At the trial in the Superior Court, before *Wardwell*, J., the defendant, who testified that he did not know the condition of his son's teeth, or that the work was performed, requested the judge to rule "that upon all the evidence the plaintiff was not entitled to recover." The judge refused so to rule, and the defendant excepted.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

J. C. Burke & W. S. Marshall, (*J. F. Corbett* with them,) for the defendant, submitted the case on a brief.

P. A. Fay, for the plaintiff.

KNOWLTON, J. The only exception in this case is to the refusal of the judge to rule "that upon all the evidence the plaintiff was not entitled to recover." The plaintiff's claim might be established by proof, either that the work done was authorized by the defendant, or that it was necessary for the health and comfort of the defendant's minor son, and that the defendant negligently failed to provide for him a dentist, or means to procure the services of a dentist, to do the work.

Upon this bill of exceptions we are not concerned with the weight of the evidence, if there was any evidence proper for the consideration of the jury. The defendant's son, a boy nineteen or twenty years of age, suffering with toothache, living in his father's family, would naturally be supposed to be authorized by his father in applying to a dentist for surgical treatment. *Angel* v. *McLellan*, 16 Mass. 28. After the services were rendered, he told the plaintiff to make the charge to his father. This was a representation by him that he was authorized by his father to procure the services on his father's credit. There was evidence that twice during the lifetime of the minor the plaintiff sent a statement of his charge for the services to the defendant and received no reply. Once the statement was sent by mail, postage paid, with a request printed on the corner of the envelope to return to the plaintiff if not called for within five days, and this letter did not come back to the plaintiff. It was a question of fact for the jury whether the circumstances were such that the defendant would have been likely to make some answer if the bill had been contracted without his authority.

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If they answered this question in the affirmative, they properly might draw an inference against the defendant. *Sturtevant* v. *Wallack*, 141 Mass. 119, 123. They might disbelieve such parts of the defendant's testimony as tended to show that he was not liable, and from all the circumstances of the case they might believe that he authorized his son to procure the services on his credit, either by an express statement or by a course of conduct which impliedly covered the transaction.

Whether there was any evidence to charge him on the ground of his neglect to furnish his son the dental services that he needed, it is unnecessary to decide. *Exceptions overruled.*

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EDWARD W. CHADWICK, assignee, *vs.* OLD COLONY RAILROAD COMPANY.

OLD COLONY RAILROAD COMPANY *vs.* EDWARD W. CHADWICK, assignee.

Dukes County. March 8, 1898. — May 20, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

Mortgage of Railroad — Transfer to Individual — Appeal from Decree of Court of Insolvency — Equity — Statute.

A railroad company, pursuant to St. 1874, c. 372, § 57, (Pub. Sts. c. 112, § 80,) gave its negotiable promissory note to a connecting railroad company, secured by a mortgage on its property and franchises, made to two persons as trustees for the promisee, containing a power to the mortgagees to sell the property and franchises at auction for a breach of the condition of the mortgage. Subsequently, the mortgagees and the promisee entered into an agreement with A., a natural person, that upon certain payments made by him from time to time they would transfer the note and assign the mortgage to him, and until the final payment they should hold the note and mortgage and enforce the same for his benefit. A., after making two partial payments under the agreement, became insolvent, and his assignee in insolvency brought an action against the original promisee to recover back the money paid to it. *Held*, that the action could not be maintained.

A railroad company which was, pursuant to St. 1874, c. 372, § 57, (Pub. Sts. c. 112, § 80,) the holder of a mortgage of the property and franchises of another railroad company, entered into an agreement with A., a natural person, upon the payment of a certain sum by him, to assign and transfer to him the mortgage and the note secured thereby. A., having paid a portion of the sum, became

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insolvent, and upon the petition of the mortgagee the Court of Insolvency directed a sale of the mortgaged property and franchises, and authorized the mortgagee to prove its claim as a creditor for any balance of the debt, and the assignee appealed to the Superior Court, and, on the affirmation of the decree, to this court. *Held*, that the proper remedy was by an application to this court under Pub. Sts. c. 157, § 15; that the Superior Court had no jurisdiction, and that the appeal should be dismissed.

KNOWLTON, J. The first of these actions is brought to recover the sum of ten thousand dollars, with interest, paid by Joseph M. Wardwell to the defendant. Wardwell is an insolvent debtor, and the plaintiff is his assignee. The payment was made under an agreement whereby Wardwell became the purchaser from the defendant of a note given by the Martha's Vineyard Railroad Company to the defendant, secured by a mortgage on the property and franchises of this railroad company. The note and mortgage were given in accordance with the provisions of St. 1874, c. 372, § 57, which authorizes a railroad corporation to aid in the construction of any "connecting railroad within the limits of this Commonwealth, whether connected by railroad or steamboat lines, by subscribing for shares of stock in such corporation, or by taking its notes or bonds, to be secured by mortgage or otherwise, as the parties may agree." There is no dispute that the Martha's Vineyard Railroad Company was connected with the Old Colony Railroad Company by a steamboat line, and that the Old Colony Railroad Company was authorized by the statute to aid in the construction of the railroad of the other corporation to the amount of the note, which was for thirty-six thousand dollars, payable in ten years after date, with interest semiannually, at seven per cent per annum, and that it furnished money to that amount for that purpose. The only questions raised in regard to this transaction are as to the form of the note and the form of the mortgage, the note being in terms negotiable, and the mortgage containing a power to the mortgagees to sell the property and franchises at auction for a breach of the condition of the mortgage. The mortgage was made to two individuals as trustees for the defendant.

On January 18, 1890, more than fifteen years after the mortgage was given, the defendant entered into an agreement with Wardwell, in consideration of five thousand dollars paid by him

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on that day, and five thousand dollars more to be paid on May 19 of the same year, and twenty-six thousand dollars to be paid on January 1, 1895, with interest at five per cent, to transfer and deliver the note to him or to such persons as he might in writing request; and the trustees agreed in the same writing that, upon the transfer and delivery of the note, they would assign the mortgage to the person to whom the note was transferred and delivered. It was also agreed that until the payments should all be made the defendant should hold the note, and the trustees should hold the mortgage and enforce it for his benefit in such manner as he might in writing request. Wardwell made the second payment of five thousand dollars, but failed to pay the balance. To recover the sum of ten thousand dollars made up of these two payments, and also the interest, the plaintiff brings this suit, contending that the agreement was illegal and void. His contention is, in substance, that such a mortgage as the statute authorizes could not give a title to the road that could pass by a foreclosure or otherwise to the hands of any natural person, or to any railroad company except the one which aided in the construction by taking the notes or bonds.

As a part of the history of the case it appears that the trustees afterwards held the mortgage for Wardwell's benefit until May, 1892, when they foreclosed it by a sale under the power to the defendant. The defendant then conveyed the property and franchises acquired by the deed from the trustees under the power to Wardwell, and Wardwell gave a mortgage back to the defendant to secure the unpaid balance that he owed under the original agreement. All this was done by agreement with Wardwell or at his request, Wardwell having been appointed by the trustees superintendent and general manager of the railroad from the date of the first agreement with him, and having acted as such until the time of the foreclosure. On October 21, 1895, Wardwell was adjudged an insolvent debtor on his own petition, and he then owed the defendant under his agreement twenty-six thousand dollars, and interest thereon for nearly three years.

The second of these cases is an appeal from a decree of the Court of Insolvency directing a sale of the mortgaged property and franchises on the petition of the defendant in the first case,

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and authorizing it to prove its claim as a creditor for any balance of the debt. The appeal was taken by the assignee to the Superior Court, and upon an affirmation of the decree by that court, he appealed to this court. In these proceedings it is clear that the appellant has mistaken his remedy, as the statute does not provide for an appeal from the Court of Insolvency to the Superior Court in a case of this kind, and the Superior Court has no jurisdiction. *Woodward* v. *Spurr*, 138 Mass. 592. The remedy for an erroneous decision by the Court of Insolvency upon such a question is by an application to this court under the Pub. Sts. c. 157, § 15. The appeal must be dismissed.

The questions raised in the action at common law involve a consideration of the rights of mortgagees of railroads. Our statutes authorize railroad corporations to mortgage railroads in certain cases, but they do not particularly define the rights of the mortgagees. Pub. Sts. c. 112, §§ 62–80. The general language used implies that their rights are like those of mortgagees of other kinds of property, except so far as they are affected by the provisions of the statutes for the management or use of the property.

It has sometimes been contended that the franchises of a corporation cannot be conveyed by mortgage in connection with its property. It is true that the franchise to be a corporation is not assignable, or in any way transferable. The distinction between the franchise to be a corporation, and the franchise to use the corporate property for the purposes for which the corporation was organized, was pointed out by Mr. Justice Curtis in *Hall* v. *Sullivan Railroad*, 21 Law Rep. 138, (2 Redf. Am. Ry. Cas. 621,) and has been recognized many times by courts of high authority. In *Memphis & Little Rock Railroad* v. *Railroad Commissioners*, 112 U. S. 609, 619, the court says: "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended tc be secured. They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural

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persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation." In the opinion in *New Orleans, Spanish Fort, & Lake Railroad* v. *Delamore*, 114 U. S. 501, 509, is this language: "The authority to mortgage the franchises of a railroad company necessarily implies the power to bring the franchises so mortgaged to sale, and to transfer them with the corporeal property of the company to the purchaser. It could not be held that, when a mortgage on a railroad and its franchises was authorized by law, the attempt of the mortgagor to enforce the mortgage would destroy the main value of the property by the destruction of its franchises." In *Bank of Middlebury* v. *Edgerton*, 30 Vt. 182, 190, the court says: "The right to build, own, manage, and run a railroad, and take the tolls thereon is not of necessity of a corporate character or dependent upon corporate rights. It may belong to and be enjoyed by natural persons, and there is nothing in its nature inconsistent with its being assignable." A similar doctrine has been stated or recognized in many other cases. See *Morgan* v. *Louisiana*, 93 U. S. 217, 223; *Trask* v. *Maguire*, 18 Wall. 391, 409; *Chesapeake & Ohio Railway* v. *Miller*, 114 U. S. 176; *Jackson* v. *Ludeling*, 21 Wall. 616; *Jackson* v. *Ludeling*, 99 U. S. 513; *State* v. *Sherman*, 22 Ohio St. 411, 428; *Meyer* v. *Johnston*, 53 Ala. 237, 327; *Chaffe* v. *Ludeling*, 27 La. An. 607; *Willink* v. *Morris Canal & Banking Co.* 3 Green Ch. 377. So far as we are aware, the cases bearing upon the subjects all hold that a mortgage of a railroad and other property of a railroad corporation includes the franchise to use the property for the purposes for which it is held by the corporation. This right will pass to a purchaser at a foreclosure sale, whether the sale is to a corporation or to an individual. A mortgage of property necessarily implies the right in the mortgagee to make the property available. This may be either by a sale or by use. There is no good reason why the right to sell should be restricted to cases in which an existing railroad corporation is willing to become the purchaser. With such a restriction a mortgage on the property and franchises of a railroad ordinarily could only be made available through an actual use by the mortgagee, or through a contract under the Pub. Sts. c. 112, § 66, with the mortgagor.

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By the Pub. Sts. c. 112, § 70, the Supreme Judicial Court is given jurisdiction "of all questions arising out of railroad mortgages." In *Troy & Greenfield Railroad* v. *Commonwealth*, 127 Mass. 43, it is said that chapter 140 of the General Statutes (Pub. Sts. c. 181) relates only to mortgages of real estate, and it is implied that the only jurisdiction to foreclose mortgages upon railroads is in equity. We think there is no doubt that a court of equity under our statutes has jurisdiction over suits to foreclose mortgages of railroads, and in such cases may order a sale of the property and franchises covered by the mortgage.

The right to foreclose such a mortgage by a sale, and the right of an individual, as well as a corporation, to purchase at the sale and to transfer to others the title which he acquires, is recognized by the St. 1886, c. 142, § 1, which is as follows: "A purchaser of a railroad at a sale under a valid foreclosure of a legal mortgage thereof, and his grantee and successors in title, shall be subject to all and the same duties, liabilities, restrictions, and other provisions respecting such railroad, or arising from the construction, maintenance, and operation thereof; and have all and the same powers and rights relating to said railroad, and the construction, maintenance, and operation thereof, which the corporation by which said mortgage was made was subject to, and had at the time of said sale." This statute is declaratory of the law as it exists without legislation in other jurisdictions, and as doubtless it would have been held to be in this Commonwealth upon general principles before the enactment of the statute. It follows that the agreement under which the payments were made by Wardwell was not contrary to public policy, and it gave him equitable rights in the mortgaged property and franchises that furnish a valuable consideration for his payments. It also follows that the original mortgage was not illegal in that it was made to secure a negotiable promissory note.

The effect of a power of sale inserted in a mortgage of a railroad it is not necessary in this suit to determine, inasmuch as the validity of the payments made by Wardwell under the agreement does not depend upon it. Powers of sale in mortgages have been recognized by the courts and by the statutes in this Commonwealth for many years, and if they are not objec-

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tionable in terms, we see no reason why they should not be given effect in mortgages of railroads as well as of other property.

The fact that St. 1874, c. 372, § 57, (Pub. Sts. c. 112, § 80,) in authorizing the making of mortgages of railroads, does not expressly mention their franchises, is immaterial. The franchise to use the railroad and its appurtenances goes with the railroad by implication when an entire railroad is conveyed. That a mortgage can be made originally only to a connecting railroad under this statute does not indicate that the mortgagee can make it available only by operating the railroad, and that the franchises cannot be used by a purchaser. So to hold would put a limitation upon the mortgage, for which there is no warrant in the statute.

The grounds upon which the plaintiff seeks to recover are untenable.

Judgment for the defendant, and appeal dismissed.

J. H. Benton, Jr., for the railroad company.

W. H. Cobb & L. LeB. Holmes, for Chadwick.

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ELLA M. WILD *vs.* BOSTON AND MAINE RAILROAD.

Middlesex. March 9, 1898. — May 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Fire set by Locomotive Engine — Measure of Damages — Contributory Negligence — Statute — Law and Fact.

At the trial of an action of tort to recover the value of a building destroyed by fire communicated by one of the defendant's locomotives, there was evidence tending to show that when the engine passed the building, which stood close to the track, it was throwing smoke and sparks, and the wind was blowing across the track toward the building; that shortly afterward fire was discovered, and was first seen in some hay in the basement of the building under a broken window which was in the side of the building next to the track; that there had been no fire in the office or the engine-room of the building for several days previous; and that the locomotive was equipped with a spark arrester and a netting in the smokestack, and was not known to be a spark thrower. *Held*, that the evidence warranted a finding that the fire was communicated by the locomotive.

The owner of a building in which hay is stored, who suffers a window on the side

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of the building parallel with and near to a railroad track to remain broken for two or three days, cannot be held guilty of such contributory negligence as to preclude his right to recover damages for the loss of the building by fire set by a spark which flew into the window from a passing locomotive.

The St. 1895, c. 298, relative to damages from fires communicated by locomotive engines, is not retroactive, and does not modify the rule of damages in a cause of action for a loss occasioned by fire set by a locomotive engine arising prior to its enactment.

No exception lies to the refusal of the judge presiding at the trial of an action to withdraw the case from the jury at the close of the evidence for the plaintiff, unless the defendant rests on the same evidence.

TORT, for damages occasioned by the loss of the plaintiff's mill and grain elevator, on January 18, 1891, by a fire communicated by one of the defendant's locomotives. Writ dated August 12, 1896. The plaintiff alleged in the declaration that she brought the action for the insurance companies to the extent of the amounts paid by them, and for her own use and for the excess of her loss over said amounts and interest. Trial in the Superior Court, before *Braley*, J., who allowed the following bill of exceptions.

The plaintiff's mill was in Billerica, and its westerly end stood about fifteen feet from the defendant's railroad track. It was a wooden building, two stories high, upon stone foundations. On the side nearest to the railroad there were four basement windows, in one of which, for two or three days previous to the fire, there had been, to the knowledge of the occupants, a broken pane of glass. There was an office containing a stove, and an engine in the building, and in a shed or "lean to" a boiler; but there was no fire in the office stove on the day of the fire, and there had been none in the boiler furnace for two days prior thereto. The basement was stored with merchandise, and near the broken window pane was a quantity of hay.

At about noon on the day of the fire the defendant's locomotive engine passed the plaintiff's mill with a train of cars, puffing hard and throwing smoke and sparks, and a wind was blowing at that time across the track toward the mill, and the weather was misty and sleety. The fire was discovered a short time thereafter, and when first seen was in the hay under or nearly under the broken window. The building and contents were destroyed, and the plaintiff afterward received $4,500 insurance thereon.

At the close of the plaintiff's case the defendant requested the

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judge to rule that the plaintiff was not entitled to recover, but the judge refused so to rule, unless the defendant would also rest. The defendant declined so to do, and excepted to the judge's refusal to rule as requested.

The defendant then offered evidence tending to prove that rain was falling on the day of the fire; that the engine was equipped with a spark arrester, and had a heavy netting in the smokestack, and was not known to throw sparks; that when passing the plaintiff's mill the fire of the engine was not being stirred, nor was the engine throwing sparks.

The defendant requested the judge to rule: 1, that upon all the evidence the plaintiff was not entitled to recover; 2, that the conduct of the plaintiff, either by way of contributory negligence or else as furnishing proximate cause for the fire, was such that she was not upon the evidence entitled to recover; 3, that, under the St. 1895, c. 293, relative to damages from fires communicated by locomotive engines, the measure of damages was the fair value of the property, as shown by the evidence, upon the day of the fire, less the amount received by the plaintiff for insurance thereon.

The judge declined to rule as requested, and ruled that, if the action could be maintained, the plaintiff was entitled to recover the fair value of the property at the time it was burned.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

S. Butler, for the defendant.

A. D. Hill, (*H. E. Bolles* with him,) for the plaintiff.

MORTON, J. We think that there was evidence which warranted a finding by the jury that the fire was communicated by the locomotive. There was testimony tending to show that it was discovered only a short time after the locomotive had passed, and when first seen was in the hay which was under or nearly under the broken window that was in the side of the building next to the track. There was also testimony tending to show that when the locomotive passed the building it was "throwing smoke and sparks," and that on the day of the fire there had been no fire in the office stove and for a day or more none in the engine-room, which were the only places in the building where there ordinarily would be fire. Whether the direction of the

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wind and the state of the weather were such that the fire could have caught from a spark from the locomotive, or whether, in view of the history and construction of the locomotive, a spark could have escaped from it, or would have been likely to have escaped from it, were questions of fact for the jury.

It is possible that the law is stated too strongly in regard to the doctrine of contributory negligence in *Wall* v. *Platt*, 169 Mass. 398, 405. But, however that may be, we think that it cannot be held, as matter of law, that one who suffers a window to remain broken for two or three days, as there was testimony tending to show was the case here, in the side of a building in which hay is stored next and near to a railroad track, is guilty of such contributory negligence in case a spark from a locomotive enters the broken window and sets the building on fire as to prevent him from recovering. The strongest that it can be put for the defendant is that the question is one for the jury to determine.

The fire occurred on January 18, 1891. The writ is dated August 12, 1896. The rights and liabilities of the parties are to be determined as of the date of the fire, unless something has occurred in the mean time to change them. The defendant contends that the St. 1895, c. 293, has modified the rule of damages so that the plaintiff, if entitled to recover at all, is entitled to recover only the fair value of the property less the amount received by her for insurance thereon. The general rule is, that statutes operate prospectively, and not retrospectively, "unless it is otherwise distinctly expressed in them, or clearly implied from the necessity of thus giving effect to their provisions." *Shallow* v. *Salem*, 136 Mass. 136. There is nothing in the statute referred to which in express terms renders it retroactive, and we discover nothing in it which renders it necessary to so construe it in order to give effect to its provisions, or which takes it out of the operation of the general rule.

The request for a ruling that, on the plaintiff's evidence, she was not entitled to recover, was rightly refused. The state of the evidence would not have justified such a ruling. Moreover, the defendant did not rest at the conclusion of the plaintiff's evidence, and therefore was not entitled to an exception to the refusal of the court to give the ruling asked for. *Goss* v. *Calkins*, 162 Mass. 492.

Exceptions overruled.

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JOHN W. FALLON *vs.* WEST END STREET RAILWAY COMPANY.

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Suffolk. March 9, 1898. — May 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Personal Injuries — Negligence — Employers' Liability Act.

A street car, operated by electricity in the usual manner cannot be said to be a locomotive engine on a train upon a railroad within the meaning of the employers' liability act, St. 1887, c. 270, § 1, cl. 3.

TORT, for personal injuries occasioned to the plaintiff by reason of the alleged negligence of the motorman of a street car operated by electricity belonging to the defendant, of which car the plaintiff was conductor. Trial in the Superior Court, before *Hardy*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

C. R. Clapp, (*H. N. Glover, Jr.* with him,) for the plaintiff.

G. H. Mellen, for the defendant.

MORTON, J. The plaintiff contends that a street railway car operated by electricity upon a street railway track is a "locomotive engine or train upon a railroad," within the meaning of St. 1887, c. 270, § 1, cl. 3. So far as any definition has been given by statute to the word "railroad" it has been confined to railroads operated by steam. Pub. Sts. c. 112, § 1. It is true that this is declared to be the meaning of the word for that and the following chapter, and that in other cases the word has been held to include street railways. *Central National Bank* v. *Worcester Horse Railroad*, 13 Allen, 105. It is also true that tracks laid for temporary purposes, but used for locomotives operated by steam and for cars such as are used on steam railroads, have been held to be railroads, within the meaning of the act. But we think that by the words "locomotive engine or train upon a railroad" must be understood a railroad and locomotive engines and trains operated and run or originally intended to be operated and run in some manner and to some extent by steam. This undoubtedly was the sense in which the words were used by the Legislature

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when the statute was enacted, and we do not feel justified now in giving to them the broad construction for which the plaintiff contends. Possibly a railroad, where the motive power has been changed in part or altogether from steam to electricity, or some other mechanical agency, but which retains in other respects the characteristics of a steam railroad, would come within the purview of the act. It is not necessary, however, to decide that question now. The defendant is a street railway operated by electricity, and running the usual street car in the usual manner. We think that a car belonging to it, and operated in the manner in which cars upon street electric lines usually are, cannot be said to be a locomotive engine or a train upon a railroad within the meaning of the statute in question.

Exceptions overruled.

CHARLES E. HAMER *vs.* BENJAMIN D. ELDRIDGE.

Barnstable. March 9, 1898. — May 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Statutory Penalty for selling or giving Intoxicating Liquors to a Minor — Demurrer — Emancipation — Bringing of Action after Minor comes of Age.

The declaration in an action of tort brought to recover the penalty imposed by Pub. Sts. c. 100, § 24, for selling or giving intoxicating liquors to a minor, is not demurrable on the ground that it alleges that the defendant, by himself, his agent or servant, did sell or give, etc., and thus leaves it uncertain whether a sale or gift is alleged, and by whom; and the action, when brought by the father, at least, is not affected by the emancipation of the minor before the sale, or by the fact that it was brought after he had come of age.

TORT, to recover the penalty imposed by Pub. Sts. c. 100, § 24, for selling or giving intoxicating liquors to a minor. The defendant demurred to the declaration, and the demurrer was overruled by *Wardwell*, J.

The jury returned a verdict for the plaintiff, and the defendant, being aggrieved by the exclusion of certain evidence and the refusal to give certain instructions, alleged exceptions. The grounds of demurrer and the material facts are stated in the opinion.

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H. P. Harriman, for the defendant.

D. M. Nickerson, Jr., for the plaintiff, submitted the case on a brief.

HOLMES, J. This is an action of tort, brought to recover the penalty imposed by Pub. Sts. c. 100, § 24, for selling or giving intoxicating liquors to a minor. The plaintiff is the father of the minor. At the trial the defendant offered evidence that before the sale the plaintiff had emancipated his son. The court refused to admit it, and the defendant excepted. It appeared that the suit was brought after the minor had come of age. The court was asked to rule that this was a defence, but the court refused, and the defendant excepted. There was also a demurrer to the declaration on the ground that it alleged that the defendant by himself, his agent or servant, did sell or give, etc., and thus left it uncertain whether a sale or gift was alleged, and by whom.

We take up the demurrer first. The ground just mentioned is not argued. Under the statute it is immaterial whether the transaction was a sale or a gift, and whether it was carried out by the defendant in person or by his agent. It now is suggested that the counts are bad because they end with an allegation that "the defendant owes the plaintiff" the penalty. This is one of those purely formal criticisms which must be made on the record if it is thought worth while to make them. *Steffe* v. *Old Colony Railroad*, 156 Mass. 262, 263. Furthermore, we see no objection to the allegation. The statute makes the defendant liable to pay the plaintiff a definite sum. We do not see why this liability may not be expressed by the word "owes," although it is required to be enforced in an action of tort.

The defendant's argument is addressed chiefly to the exceptions. That on the effect of emancipation, based on one or two expressions in *Roberge* v. *Burnham*, 124 Mass. 277, and *Day* v. *Frank*, 127 Mass. 497, treats the liability as if it were analogous to the liability to a parent or master for causing a loss of service, and therefore could not last longer than the service lasts. But the cases mentioned are explained in *O'Connell* v. *O'Leary*, 145 Mass. 311. In that case it is decided that the liability is a liability for a penalty or forfeiture. This being so, the fact of emancipation is immaterial.

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The other exceptions, based on the son's now having come of age, undertake to read a qualification into the statute which is not there. It is said that the action is given to the parent or guardian, and it is asked whether one who had been a guardian could sue after his ward had reached twenty-one. We will decide that question when it arises. If such a person could not recover, it would be because of the words of the statute. The words afford no trouble in the present case. The parent is as much a parent now as ever, and, the suit being for a penalty, there is no ground for supposing that the Legislature meant it to abate if it did not get to judgment before the minor had reached manhood. It certainly said nothing of the kind.

Demurrer overruled, and exceptions overruled.

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WILLIAM H. DRURY & another *vs.* JOSEPH B. MOORS & another.

Suffolk. March 10, 1898. — May 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Conversion — Possession.

At the trial of an action by an assignee in insolvency for the conversion of a quantity of iron belonging to his insolvent, there was evidence tending to show that the iron had been transferred by bills of sale by the insolvent to the defendant to secure advances made by him; that the iron was kept in a yard, under lock and key, at some distance from the insolvent's warehouse; that the key of the yard was kept in the insolvent's office over the desk of his bookkeeper, whom the defendant had appointed his agent to keep possession of the property; that portions of such iron were from time to time released by the defendant to the insolvent for sale by him, which were subsequently made good by him by bills of sale of new iron; and that after the insolvency the defendant took the key of the yard to his office and kept it there. *Held*, that there was no evidence that, prior to the insolvency, possession of the goods was delivered to or retained by the defendant, and that the judge properly directed a verdict for the plaintiff.

TORT, by the assignees in insolvency of Fred A. Houdlette, for the conversion of a quantity of iron. At the trial in the Superior Court, before *Hopkins*, J., there was evidence tending

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to show that Houdlette was an iron and steel merchant, who, prior to February 8, 1893, had a store at the corner of Franklin and Hamilton Streets in Boston, and who leased a vacant lot of land on High Street, where the heavier parts of the iron were kept; that the lot was at some distance from the warehouse, separated from it by streets and buildings, and was enclosed partly by the walls of adjoining buildings and partly by a fence with gates; that the key to one of the gates was kept by Houdlette, and usually hung in his store over the desk of his bookkeeper, Garrett; that from time to time, from June 5, 1889, to December, 1892, Houdlette gave bills of sale of the whole or portions of the iron in the store and yard to the defendants as security for money lent by them, and memoranda of the delivery were indorsed on the bills of sale, and the defendants, or some one in their employ, went to the store or yard, to whom Houdlette pointed out the iron, and who took possession by touching it; that Garrett, Houdlette's bookkeeper, was appointed to represent the defendants; that from time to time the defendants released portions of the iron, and received in exchange bills of sale of new iron which came into the store or yard; that in December, 1892, Houdlette gave to the defendants a bill of sale of his entire stock, and on January 13, 1893, a further bill of sale of a specified quantity of iron, possession of which was given in the usual manner; that on February 8, 1893, Houdlette filed a petition in insolvency, and a messenger was placed in possession of the store, who testified that the key to the yard was then on Garrett's desk with the other keys that he took possession of, but that, having some doubts as to his right to take possession of the property in the yard, he never went there, and did not remember having said that he took possession of it; that on February 13, 1893, the defendants demanded of the messenger in writing certain specified lots of iron in Houdlette's store, and on February 16 or 17 one of the defendants' clerks took the key from its place over Garrett's desk and carried it to the defendants' office, where it was kept until after the goods were sold; that Houdlette's assignees put padlocks on the gates of the yard, which were afterward taken off by the defendants, whereupon suit was brought against them.

The judge ruled that there was no evidence that the defend-

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ants had taken or held possession of the merchandise in the yard, and directed the jury to return a verdict for the plaintiffs. The defendants alleged exceptions; and at their request the judge reported the case for the determination of this court. If the ruling was wrong, the verdict was to be set aside; otherwise judgment was to be entered on the verdict.

R. M. Morse, for the defendants.

S. L. Whipple, (*J. Smith, Jr.* with him,) for the plaintiffs.

HOLMES, J. This is an action by assignees in insolvency to recover the value of certain goods converted by the defendants to their own use. The goods in question were mortgaged or pledged to the defendants by one Houdlette, in the manner and course of dealing described in *Moors* v. *Reading*, 167 Mass. 322, and the question here, as there, is whether the mortgaged property was delivered to and retained by Moors. St. 1883, c. 73, § 2.

It is argued that this case may be distinguished from the former one, because there the goods were only a part of the goods in Houdlette's warehouse, and were mingled with Houdlette's own through Moors's neglect or permission, and also because they formed a principal part of Houdlette's stock in trade, etc., whereas in the case at bar the iron was in a yard where heavy goods were kept under lock and key, and sufficiently identified. The yard was at some distance from the warehouse, and was separated from it by streets and buildings. But in our opinion, if there are differences between this case and the former one, they are unfavorable to the defendants. It is questionable whether there is any evidence of delivery, which seems to have been proved in the former case; see *Moors* v. *Reading*, 167 Mass. 322, 324, and *Parry* v. *Libbey*, 166 Mass. 112; and whereas it might have been argued in the former case that the large liberty allowed Houdlette in the way of selling the mortgaged goods, the mixture with Houdlette's own and the influx and efflux to and from the mortgaged stock were only evidence warranting a finding that Moors did not retain possession rather than indicia requiring a ruling, as matter of law, that he did not, here there are the additional facts that the goods were under lock and key in Houdlette's private enclosure, and that the only key known so far as appears was in Houdlette's possession. The testimony

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is that the key was kept in Houdlette's office, over the desk of Garrett, the bookkeeper, whom Moors had made his agent to keep possession of the property, but it nowhere is suggested that he held this key adversely to Houdlette, or that he had any such relation to it that he could have sued for it if it had been carried off. The essential facts relied on in the former decision were true in the present case, and in addition there was a present exclusive control of the goods by Houdlette.

Judgment on the verdict.

JENNIE M. QUINN, administratrix, *vs.* TIMOTHY CRIMMINGS.

Middlesex. March 10, 11, 1898. — May 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Personal Injuries — Falling Fence — Liability of Owners of Division Fence.

If as between two adjoining owners the duty to maintain a partition fence is upon one of them exclusively, the other owner is not liable to a third person for a personal injury caused by the fall of the fence.

If the owner of a partition fence uses the care of a prudent man in maintaining it, he is not liable to a third person for a personal injury caused by its fall.

TORT, by the administratrix of Peter L. Quinn, for injuries sustained by her intestate from the falling of a division fence, which, it was alleged, the defendant suffered to remain in an unsafe condition. At the trial in the Superior Court, before *Bond*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions. The material facts appear in the opinion.

S. A. Fuller & C. H. Blood, for the plaintiff.

H. N. Shepard, for the defendant.

HOLMES, J. This is an action to recover for personal injuries suffered by the plaintiff's intestate, of which he afterwards died. The deceased had gone to a drinking place, had drunk one glass of whiskey and was leaving the place, when a fence dividing the premises from the defendant's land fell upon him without warning. The testimony was that the deceased was sober, and was

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doing nothing to cause the fence to fall. The jury found for the defendant, and the case is here on exceptions to certain rulings and refusals to rule. It is not necessary to set these forth at length, as the questions raised by them and argued may be stated in a few words.

The first question is whether, if, as between the defendant and the owner of the premises where the intestate was, the duty to maintain the fence was on the latter, the defendant nevertheless could be held by the plaintiff; the argument for the plaintiff being that private arrangements with a neighbor could not affect the liability to him of an owner of the land on which presumably, it is said, the division fence stood in part.

It is true that there are cases where an immediately threatening danger is created upon the defendant's land by his order, and where the intervening control is not that of an occupant, in which the defendant is held to be bound personally to see that proper precautions for safety are taken, although he has given up the control to an independent person, as where he employs an independent contractor. *Woodman* v. *Metropolitan Railroad*, 149 Mass. 335. So a master has somewhat similar duties to a servant in his employ.

But examples of liability to the public being affected by private arrangements are not unknown. A landlord may shift his responsibility for snow falling from the roof of his house into the street by giving control to a tenant, and will have the right to rely upon the tenant's managing the premises in such a way as to prevent their becoming a nuisance. The fact that action, and not merely abstinence from illegal acts, on the part of the tenant is required to prevent the harm is not conclusive. *Clifford* v. *Atlantic Cotton Mills*, 146 Mass. 47, 49. Compare *Murphey* v. *Caralli*, 3 H. & C. 462, 465, 466, judgment of Bramwell, B. So where a tenant has covenanted to repair, and an injury is caused by the premises being allowed to fall out of repair. *Pretty* v. *Bickmore*, L. R. 8 C. P. 401. *Gwinnell* v. *Eamer*, L. R. 10 C. P. 658. On the other hand, the landlord may be liable if he has covenanted to repair. *Payne* v. *Rogers*, 2 H. Bl. 350. In these cases all that was contemplated at the time of the lease was the continuance of a situation which by the forces of nature might become dangerous if the person intrusted did not do his duty.

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If the transfer were absolute, every one would recognize that the responsibility was changed with the ownership. The same principle is applied when the occupancy and control are transferred for a certain time, and when there is no present nuisance, but the danger is relatively contingent and remote. The tenant unquestionably owes a duty to the public, and the landlord has a right to assume that he will perform it. The tenant is the wrongdoer nearest to the injury, and the law looks no further back.

The rule which has been applied in the case of landlords and tenants, not without some difference of opinion among the courts of different States, applies with greater force to division fences. The division of the duty of maintaining these is established by statute, and may be insisted on even against an unwilling neighbor. Pub. Sts. c. 36, §§ 1–19. The law makes the party who is bound to maintain the fence responsible to the public so far as they have any concern in the matter. There is no general *delectus personarum* as between him and the other possible defendant, his neighbor, and it would be unjust to add the other as jointly liable for the condition of a structure which he did not maintain and perhaps had no right to touch.

The other question arises with regard to the instructions given and refused concerning the defendant's duty, supposing he was responsible. The only evidence of the defendant's interest or duty was the fact that the fence was a division fence. The defendant had not repaired it for twenty years. He removed it, it is true, after it had fallen, but that was simply clearing away rubbish from his land, and was no evidence. It admits of question whether the plaintiff had sustained the burden of proof. He was allowed to go to the jury, however, and the jury were told that the defendant had not a right to allow the fence to get into such a condition that it was liable to injure a person on the adjoining premises by reason of its want of repair. This imposed an absolute liability for want of repair as effectively as if the judge had used the more amplified and rhetorical expressions of the requests.

After dealing with want of repair, the judge went on: "Of course you have to take into consideration here the condition of the fence, and whether or not it was that which caused it to fall

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over; because if there had been any such extraordinary condition of things that it was blown over, and fell from any such cause as that, that might relieve the defendant from any responsibility, because he is not called upon to provide against such extraordinary conditions; but any conditions that he ought to have anticipated he is bound to provide against." A part of this was excepted to upon the refusal to modify it, as was also a refusal to give further rulings. Nothing appears in the exceptions concerning the state of the wind, and it does not appear that there was any need for the judge to deal with it more specifically, especially when the matter was not brought to his attention until the end of the charge. *McMahon* v. *O'Connor*, 137 Mass. 216. The fair meaning of what we have quoted, as a whole, is simply that the defendant was not called on to provide against winds which he could not have anticipated. This is consistent with *Cork* v. *Blossom*, 162 Mass. 330, 332. It is true that every one has notice of the force of gravitation, and therefore it would be possible logically to make owners absolutely liable if their buildings fall. Clerk & Lindsell, Torts, (2d ed.) 377, 378. *Rylands* v. *Fletcher*, L. R. 3 H. L. 330. Compare Pollock, Torts, (4th ed.) 470. But it is for the public welfare that buildings be put up, and here as elsewhere policy and custom have to draw the line between opposing interests. *Middlesex Co.* v. *McCue*, 149 Mass. 103, 104. That line is the line between what could have been prevented by proper precautions and accident, meaning by accident that which could not have been foreseen and guarded against otherwise than by not building. For although all accidents could be prevented by not building, yet, as it is desirable that buildings and fences should be put up, the law of this Commonwealth does not throw the risk of that act any more than that of other necessary conduct upon the actor, or make every owner of a structure insure against all that may happen, however little to be foreseen. *Cork* v. *Blossom*, *ubi supra*. The tendency of other American decisions seems to be in the same direction. 2 Jaggard, Torts, 839; see also Pollock, Torts, (4th ed.) 470. This being so, the decision as to what precautions are proper naturally may vary with the nature of the particular structure. A boundary fence is not like a tall chimney, such as was in question in *Cork* v. *Blossom*. In

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view of the slight danger threatened by a common fence, we are of opinion that, if the jury are instructed that the owner must use the care of a prudent man in maintaining it, it is not necessary to put the duty in more emphatic terms.

Exceptions overruled.

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HORATIO N. ALLIN *vs.* CHARLES WHITTEMORE.
CHARLES WHITTEMORE *vs.* HORATIO N. ALLIN.

Middlesex. March 11, 1898. — May 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Sale — Evidence — Statute of Frauds.

If, at the trial of an action for the price of goods sold by the plaintiff to the defendant, the plaintiff has testified as to the contract of sale agreed upon in a conversation between him and the defendant's agent, and its subsequent ratification by the defendant, testimony in corroboration of such conversation is admissible.

Where, at the trial of an action for the price of certain horses sold by the plaintiff to the defendant, there is evidence that after a delivery of some of the horses the defendant paid money to the plaintiff, and the plaintiff gave a receipt for "eleven hundred dollars as a loan and horses to be considered as security when delivered unless sale is made," a request for a ruling that no sale could be shown of earlier date than the writing, and that by the terms of the writing the delivery of the horses was as collateral security, and not in pursuance of a sale, is properly refused.

At the trial of an action for the price of horses sold by the plaintiff to the defendant, a witness for the defendant, for the purpose of showing that the delivery of the horses was not in pursuance of a completed sale, testified that at the time of the delivery of some of the horses he asked directions from the plaintiff, and that the plaintiff assumed authority on his own part to give directions. *Held*, that for the purpose of contradicting this witness it was competent for an expressman who had been sent by the plaintiff to the defendant for the trunks containing blankets, harnesses, etc., to testify that the previous witness had refused to give them up, and had said that the defendant wanted them to go with the horses.

When, in an action for the price of horses sold by the plaintiff to the defendant in pursuance of a contract of sale made between the plaintiff and an agent of the defendant, the agent in his testimony contradicts the plaintiff and denies the sale, evidence of conversations in which he stated that he bought the horses for the defendant, and that the defendant owned them, is admissible for the purpose of contradicting him.

It is not necessary, before contradicting the testimony of a witness produced by the other side by proof that he has said something inconsistent with it, to call his attention to the occasion and give him a chance to explain.

At the trial of an action for the price of goods sold by the plaintiff to the defend-

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ant, in which the answer is a general denial, the correctness of a refusal to rule that the case is within the statute of frauds is unnecessary to be considered if the jury find that there was evidence of a delivery and acceptance of the goods by the defendant.

TWO ACTIONS OF CONTRACT, one for the price of horses alleged to have been sold by the plaintiff to the defendant, and the other a cross action for the board of the same horses from the time of the alleged sale and delivery to the date of the writ. The writ in the second case was dated November 25, 1896. The answer in the first case was a general denial.

The cases were tried together in the Superior Court, before *Braley*, J., and a verdict was returned for Allin in each case. Whittemore alleged exceptions. The material facts appear in the opinion, and in a note by the reporter.

S. J. Elder & W. C. Wait, for Whittemore.

G. L. Mayberry, for Allin.

HOLMES, J. These are two actions, one for the price of horses alleged to have been sold, the other a cross action for the board of the same horses, etc., from the time of the alleged sale and delivery to the date of the writ. The plaintiff Allin testified to an agreement with one Hayden, a trainer employed by the defendant Whittemore, and speaking on his behalf, by which Whittemore was to take the horses at four hundred and fifty dollars a head, subject to adjustment as to more than half of them, which were to come from the west, and had not been seen by the defendant. The plaintiff testified that this agreement was stated by Hayden to the defendant, and that the latter said, "Yes, that is as I understand it, whatever Frank agrees to I will carry out," and that the plaintiff said, "The stock is yours." Afterward the horses were delivered to the defendant. This story was contradicted, but Allin got a verdict in both suits, and the cases are here on exceptions. Those in the suit against Allin are to the admission of evidence also excepted to in the suit by him, so that all the questions are raised in the suit by Allin for the price under the alleged sale.

The first exception is to allowing another witness to corroborate the plaintiff's account of the conversation between himself and Hayden. The plaintiff's testimony just stated, as to what the defendant said later, is evidence that Hayden's agreement

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was either authorized or ratified, and therefore the evidence was competent.

At a later date the plaintiff had some money from the defendant, for which he gave a written receipt: "Received of Mr. Charles Whittemore, Esq., the sum of eleven hundred dollars as a loan and horses to be considered as security when delivered unless sale is made." It is suggested also that the conversation contradicts the writing, and rulings were asked to the effect that no sale could be shown of earlier date than the writing, and that by its terms the delivery of the horses was as collateral security, and not in pursuance of a sale. Such is not the effect of the document. What it does purport to establish is that the money is received as a loan, and that, if for any reason the sale does not go through, the horses, which otherwise will be held by Whittemore as purchaser, shall be held by him as security. The writing does imply an uncertainty, and no doubt Whittemore had the benefit of the fact at the trial, but it does not establish or purport to establish what the nature of the uncertainty was, — whether it arose from no bargain having been made, or from the possibility that the western horses, to which alone, it might be found from Whittemore's testimony, the writing referred, would not be up to Allin's representations, or that some of them might be killed. The writing equally implies that, if the sale did go through, the so called loan was to become a payment of part of the price. It should be added that the delivery of the western horses was more than a week later than the date of the writing. The jury, believing as they did the plaintiff's account of his conversations with Hayden and the defendant, perhaps would have been warranted, if it had been necessary, which it was not, in carrying the agreement forward to the last act done in pursuance of it.

A brother of the defendant testified to an interview with the plaintiff at the time of the delivery of some of the horses, in which he asked directions from the plaintiff, and the plaintiff assumed authority on his own part to give directions, — evidence put in of course as tending to show that the delivery was not in pursuance of a completed sale. To meet this, an expressman who was sent to the defendant by the plaintiff for the trunks, containing blankets, harnesses, boots, etc., which had been sent

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with the horses, was allowed to testify that the previous witness refused to give them up, and said that they wanted them to go with the horses. We see no ground for doubt that this tended to contradict the testimony of the previous witness. The language implied that his party owned the horses. If this was his understanding, it is unlikely that he would have asked or accepted directions from the plaintiff on the footing that the latter was the owner.

Hayden contradicted the plaintiff Allin, and testified in substance that there was no sale. Evidence properly was admitted to contradict him by showing that he had said that he had bought the horses for Whittemore, and that Whittemore owned them. The testimony of one Harris * is objected to particularly, but we do not see in what material way it differs from the rest. It is not necessary, before contradicting the testimony of a witness produced by the other side by proof that he has said something inconsistent with it, to call his attention to the occasion and give him a chance to explain. Pub. Sts. c. 169, § 22.

The defendant asked the court to rule that the statute of frauds was a defence. This was refused, on the ground that that defence was not open on the pleadings. It is not necessary to consider whether the ruling was correct, because the court instructed the jury that Allin could not recover unless the horses were delivered to the defendant and accepted by him in pursuance and in performance of the alleged contract. There was evidence of delivery and acceptance, and if they were found by the jury, as they must have been, the statute was satisfied.

Exceptions overruled.

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* Harris was asked whether anything was said by Hayden as to who owned the horses, and answered that there was.

"*Q.* What was it? . . .

"*A.* He said at the time she got shut out, said to one of the boys — I says to one of the boys as I was walking by, I says, 'Well, you got the banner, I see.' He says, 'Yes.' I heard Hayden say, 'Well, never mind, the entrance fee is all paid and Mr. Whittemore can stand it.'"

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MICHAEL HEALEY *vs.* GEORGE E. LOTHROP.

Suffolk. March 11, 14, 1898. — May 20, 1898. 171 263 f196 354

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Assault and Battery — Master and Servant — Statute — Special Police Officer.

The St. 1878, c. 244, § 6, does not make a special police officer the servant of the person at whose request he is appointed.

TORT, for an assault and battery. At the trial in the Superior Court, before *Bond*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

C. F. Eldredge, for the defendant.

W. H. Baker, for the plaintiff.

HOLMES, J. This is an action of tort against the keeper of a place of amusement in Boston, seeking to make him liable for an assault and battery alleged to have been committed by one Mead, a special police officer, while on his premises. Whatever the officer did, he did as such police officer, and without direction or knowledge on the part of the defendant. The officer was appointed in pursuance of St. 1878, c. 244, § 6, upon the application of the defendant, to serve without pay from the city, under such rules and regulations as the police commissioners deemed expedient. He was paid by the defendant, and the defendant gave the bond required by statute. At the trial, the defendant asked the judge to direct a verdict for him; but the judge refused, and instructed the jury that the defendant, under the statute and the arrangement which he had made, became liable for the official misconduct of Mead in his employment, just as for the tort of any servant. The case is here on exceptions. The only question is whether Mead was the defendant's servant. That was the ground of liability alleged in the declaration and laid down in the charge. So much of the argument for the plaintiff as turns on the supposed duty of the defendant to take reasonable care to protect the plaintiff from abuse by strangers has no bearing upon the case.

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The case depends upon the construction of St. 1878, c. 244, § 6. That section required the defendant to give bond to the city treasurer "to be liable to parties aggrieved by any official misconduct of such police officer, to the same extent as for the torts of agents and servants in their employment." It continues, "and proceedings may be had upon said bonds in the same manner as upon the bonds of constables." If the statute had meant to make the officer the servant of the person who applies for his appointment and gives bond for his conduct, presumably it would have said so. But if it had said so, it would have insisted upon a fiction being treated as a fact. It is true that the defendant asked to have an officer appointed, perhaps asked to have Mead appointed, and that he paid him. But he did not appoint him, could not remove him, and could not control his official conduct, which was governed by the regulations of the police commissioners and his own sense of duty as a public officer. The statute does not call the relation that of master and servant, and goes no further than to make the defendant liable upon his bond "to the same extent" as for a servant. The words quoted imply that the officer is not one. They mean to the same extent as in another case which does not exist. In *Dickson* v. *Waldron*, 135 Ind. 507, the jury found that the wrong done was not done by the servant in the capacity of a policeman, whereas the contrary appeared in this case. The form of the defendant's undertaking, and presumably the statute also, were different from those in the present case.

Exceptions sustained.

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COMMONWEALTH MUTUAL FIRE INSURANCE COMPANY *vs.* WILLIAM KNABE AND COMPANY MANUFACTURING COMPANY.

Suffolk. March 14, 1898. — May 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Fire Insurance — Mutual Company — Assessment — Agency — Lex Loci Contractus — Acceptance — Waiver of Payment of Premium.

A., who did business in Maryland, requested B., an insurance broker in New York, to procure insurance for him on certain property, and B. requested C., another broker in New York, to obtain such insurance for A. in a mutual insurance company organized under the laws of, and doing business in, this Commonwealth, but not authorized to do business in Maryland or in New York. C. sent an application for the insurance to D., the manager of the company here, which was accepted by the company, and a policy was written here accordingly and sent to C., to whom the premium was charged, he having an open account with D. C. delivered the policy to B., who mailed it to A., by whom a check for the premium was sent to B., who subsequently sent to C. a check payable to the order of the company for the premium, which was mailed to D. C. was paid by D. a commission for his services out of the commission allowed D. by the company, and B. was paid by A. for his services. *Held*, that C. must be regarded as the agent of A.; and that the contract contained in the policy was a Massachusetts contract.

The fact that a policy of insurance in a mutual fire insurance company contains terms and conditions not included in the application therefor, if they are not unusual or extraordinary, does not render necessary the acceptance of the policy by the assured in order to make it binding on him, but the contract becomes complete on the delivery of the policy, without any further assent on his part.

An insurance company may waive the payment of the premium in cash upon delivery of the policy, and the policy will then take effect as if it contained no provision requiring such payment.

CONTRACT, to recover the amount of six assessments upon the defendant as a policy holder in the plaintiff corporation. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, upon agreed facts, in substance as follows.

The plaintiff was a mutual fire insurance company organized under the laws of this Commonwealth, and was authorized by statute to make insurance upon property located in any part of the United States or Canada. It issued six policies of insur-

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ance to the defendant on property situated in Maryland, in which State the plaintiff was not authorized to do business under its laws. On March 19, 1895, the plaintiff was enjoined by this court from doing further business, and subsequently a receiver was appointed. On July 19, 1895, a petition was filed in this court by the president of the plaintiff, praying that the court would examine an assessment previously voted by the directors of the company and matters connected therewith, and would ratify the assessment with such amendments as might be necessary. Upon this petition an order of notice was issued, returnable in three weeks, and published as therein directed. At the hearing upon the petition on August 19, 1895, the application was referred to an auditor, who was directed to appoint a time and place to hear all parties in the matter of the assessment, and to give personal notice thereof in writing to the insurance commissioner, and, through the post office or by publication, as he deemed practicable, to all parties liable to such assessment, and to report upon the correctness of the assessment and all matters connected therewith. Thereupon due notice was given by the auditor as directed, hearings were had, and a report was made by him. Whereupon, after due notice to all parties in interest, giving them an opportunity to be heard, this court, by a decree of March 5, 1896, among other things, ordered an assessment of $250,000, and directed the officers of the company to vote the same in legal form, which the directors proceeded to do.

Afterwards, on March 25, 1896, the court confirmed the assessment of $250,000, which was subsequently made up in detail against the different policy holders of the company subject to assessment; and by a decree dated December 9, 1896, the assessment was ratified, confirmed, and established as computed and made up upon the persons and for the amounts which appeared in the schedules annexed to the decree. By such schedules it appeared that the defendant was assessed, on six different policies, the total sum of $474.05. The decrees ordering and confirming the assessment were made after the usual publication of notices as directed by the court. Written notices of the assessments were duly sent to the defendant on July 2, 1896, demanding payment thereof. The office of the plaintiff

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was situated in Boston, where it did its business, and it had no office or agent in the State of Maryland, and none outside of Massachusetts, except in the State of North Carolina, unless it otherwise appears from the agreed facts. The insurance was effected through Tate and Cornwall, insurance brokers of New York City. The plaintiff was not admitted to do business in the State of New York. Blake and Taylor were the managers of the plaintiff, receiving for their services a certain per cent of the gross receipts, out of which they paid all expenses.

The defendant requested Glover and Company, insurance brokers of New York, to obtain for it insurance on the property described in the policies. Glover and Company applied in turn to Tate and Cornwall, requesting them to obtain such insurance for the defendant in the plaintiff company, and as a result of the requests Tate and Cornwall, with the knowledge of Glover and Company, sent applications for insurance by mail to Blake and Taylor, directed to the office in Boston, these applications stating the amount of insurance desired, the rates at which the risks were to be written if accepted, the premiums to be paid, the dates upon which the risks were to begin, and the time for which they were to continue. These applications also contained descriptions of the property upon which the insurance was to be placed, which applications were received in Boston by Blake and Taylor, acted upon and accepted by the plaintiff, whereupon policies were written in accordance with the terms set forth in the applications, dated and executed by the proper officers of the company in Boston, and transmitted by mail to Tate and Cornwall in New York.

The policies contained the following provision: "In consideration of dollars, to them paid by the insured, hereinafter named, the receipt whereof is hereby acknowledged, and the agreement by the insured, as a condition of this policy, that the said insured, or their legal representatives, shall pay in addition to said cash premium all such sums as may be assessed by the directors of said company, pursuant to the laws of the Commonwealth of Massachusetts, but not in any event to exceed three times the amount of said cash premium, do insure the William Knabe & Co. Manufacturing Company, of Baltimore City, and their legal representatives, against loss or damage by

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fire, to the amount of dollars"; which provision was uniform in all policies issued by the plaintiff; and in one policy was stamped the following additional provision: "It is a condition of this policy that, if at the time of loss the assured shall hold any policy of this or any other company on the property hereby insured subject to conditions of co-insurance or average, this company's liability herein shall be limited thereby to the same extent as though such clause were contained in this policy." This last provision is one that is frequently, but not uniformly, inserted in insurance policies.

The broker knew at the time the applications were sent what would be the uniform provisions in the policies not named in the applications, and also knew that the additional provision inserted in one of the policies as above quoted was frequently inserted in policies. The applications were signed by Tate and Cornwall, the signature being impressed with a rubber stamp, and being in the following form: "Tate & Cornwall, 59 William St., New York."

At the time the policies were made out the premiums were charged to Tate and Cornwall, with whom Blake and Taylor had an open account, and Tate and Cornwall were accustomed at intervals to send checks to Blake and Taylor in payment of balances due and to receive such checks from them. Tate and Cornwall received the policies from the mail in New York and delivered them to Glover and Company, who sent them from New York by mail to the defendant in Baltimore. The first policy was issued on January 1, 1894; the second and third were issued on March 27, and the last three on March 28, 1894.

The defendant, some time after receiving the policies, sent checks to Glover and Company in payment of the premiums, and Glover and Company subsequently sent to Tate and Cornwall checks payable to the order of the plaintiff in payment of the premiums. These checks were transmitted by mail from New York to Blake and Taylor in Boston, and received by the latter, the one in the payment of the premium on the first policy on February 28, 1894, the one in payment of premiums on the second and third policies on June 29, 1894, and the one in payment of premiums on the last three policies on June 30, 1894. Blake and Taylor paid Tate and Cornwall for their services in obtain-

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ing and forwarding such applications a commission on the premiums of all policies issued by the plaintiff on the applications, the commissions allowed such brokers being taken out of the commission allowed them by the plaintiff in compensation for their services, and Glover and Company were paid for their services by the defendant.

The defendant is a corporation organized under the laws of Maryland, having its usual place of business in Baltimore in that State, but having property in this Commonwealth.

S. H. Hooper, for the defendant.

W. B. Stevens, for the plaintiff.

MORTON, J. There can be no question that Blake and Company were the agents of the plaintiff, and that Glover and Company were the agents of the defendant. One question is whether Tate and Cornwall were the agents of the plaintiff or of the defendant. If they were the agents of the defendant, or were not the agents of the plaintiff, then, subject to certain considerations in regard to the terms of the policies which will be referred to later, the policies are Massachusetts contracts. If they were the agents of the plaintiff, it might still be a question whether the policies should not be regarded as Massachusetts contracts. If the policies should be regarded as New York contracts, then the question would arise whether, the insurance being on property situated in Maryland, they are rendered invalid by the laws of New York. If the policies should be regarded as Maryland contracts, the plaintiff does not contend that it is entitled to recover.

There is nothing to show that Tate and Cornwall were the authorized agents of the plaintiff. They are described as insurance brokers. They were requested by Glover and Company to obtain insurance on the property described in the policies. Glover and Company also requested them to obtain the insurance in the plaintiff company. In forwarding the application, they clearly acted for Glover and Company, who in turn acted for the defendant. They did not solicit the insurance for the plaintiff from Glover and Company, but Glover and Company requested them to procure insurance in the plaintiff company for the defendant. It seems to us plain that Tate and Cornwall must be regarded as the agents of the defendant. The fact that there were open accounts between Tate and Cornwall and

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Blake and Company, and that the premiums were charged to the former, who were paid by the latter out of the commissions which they were allowed by the plaintiff, has no tendency to show that they were its agents, nor has the fact that the checks received by Tate and Cornwall from Glover and Company, and sent by them to Blake and Company, were payable to the plaintiff's order, any such tendency. The plaintiff is a Massachusetts company. The offers contained in the applications were received and accepted by it in Boston. The policies were made and signed there. The contracts contained in the policies were to be performed there. When the policies were mailed at Boston to the defendant's agents at New York, if not before, the contracts were complete, and must be regarded, we think, as Massachusetts contracts. *Brauer* v. *Shaw*, 168 Mass. 198. *Seamans* v. *Knapp-Stout Co.* 89 Wis. 171. *Western* v. *Genesee Ins. Co.* 2 Kernan, 258. *Bailey* v. *Hope Ins. Co.* 56 Maine, 474. *Hartford Ins. Co.* v. *Lasher Stocking Co.* 66 Vt. 439.

This view renders it unnecessary to consider whether the policies would have been invalid as New York contracts, or what the effect would have been if Tate and Cornwall had been the agents of the plaintiff. The defendant contends that the policies contained terms and conditions not included in the applications, and that therefore they did not become binding until accepted by the defendant or its agents, which could not have been till they were received in New York. The applications not only did not contain the terms and conditions which the defendant says they did not, but, so far as appears, they did not contain many other terms and conditions which are in the policies. Ordinarily, it is not expected that an application for insurance will contain all of the terms and conditions which are included in the policy when it is issued. Certain particulars are named, others are not. The application is for such insurance on such terms and conditions as, in view of the particulars submitted, the company sells. It is to be presumed that, as in other cases, the purchaser has made himself acquainted with what he is purchasing. On the delivery of the policy therefore, the contract becomes complete without any further assent on the part of the insured. Possibly, if the policy contains any extraordinary provisions such as are not generally or often found

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in policies, the insured on receiving it might have a right to rescind. But that was not the case here. Moreover the plaintiff is a mutual company. The provision in the policy, that the insured should in addition to the premium pay all such sums as might be assessed by the directors, is a usual provision in mutual policies. But whether so or not, the defendant by becoming a member of a mutual company became bound to pay a proportional share of its liabilities. The plaintiff could waive the payment of the premium in cash upon delivery of the policy, and in such case the policy would take effect on delivery, and would stand as if there were no provision in it in regard to the payment of the premium in cash upon delivery. The provision contained in one of the policies in regard to co-insurance or average is not shown to have been an unusual or extraordinary provision, and it appears that the brokers who were acting for the defendant knew that it was frequently inserted in policies, and knew when the applications were sent what the uniform provisions of the policies issued by the plaintiff were, and for aught that appears made no objection.

We think that, on the whole case, the judgment of the Superior Court was right, and should be affirmed. *So ordered.*

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JACOB SPAULDING *vs.* FORBES LITHOGRAPH MANUFACTURING COMPANY.

Suffolk. March 14, 15, 1898. — May 20, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Personal Injuries — Obvious Risk — Evidence of similar Occurrences — Trap.

At the trial of an action for personal injuries sustained by the plaintiff while in the employ of the defendant, there was evidence that it was the plaintiff's duty to remove cards, as printed, from a lithographic press, in doing which he sat with his left side toward a revolving cylinder on which the cards were placed, and when the cylinder stopped, as it did automatically after each card was printed, he removed the card, another card was put upon it by another operative, and the cylinder revolved again; that the cylinder was covered by an

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iron mask while revolving, which lifted just long enough for the change of cards and closed again before the new revolution; that the plaintiff's hand was caught by the iron mask as it closed, and was injured; that the plaintiff had formerly used his left hand, that being nearest to the cylinder, to remove the cards until told by the man over him to use his right hand; that in obeying the order he leaned his body more to the left, and in so doing his seat tipped up, threw him against the machine and caused the accident; that the seat was a board four or five feet long, supported by four fixed iron rods fitted loosely into holes on the under side of the board, which rested on them unattached; that the rods were three or four inches from the end of the board nearest the cylinder and the distance between the end of the board and the cylinder was twelve or fourteen inches; and that the plaintiff was ignorant of the tendency of the seat to tip. *Held*, that the defendant was liable at common law.

At the trial of an action for personal injuries sustained by the plaintiff while in the employ of the defendant, evidence is admissible that a seat, on which he sat at his work, and by the tipping of which the accident happened, had tipped before, and that the fact was known to the man authorized by the defendant to instruct and order the plaintiff in its use.

At the trial of an action for personal injuries sustained by the plaintiff while in the employ of the defendant, while obeying the order of a person over him and who was authorized to instruct and direct him, evidence by another operative of orders given by such person is competent for the purpose of showing his authority.

TORT, for personal injuries sustained by the plaintiff while in the employ of the defendant. At the trial in the Superior Court, before *Maynard*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The material facts appear in the opinion.

J. Lowell & J. A. Lowell, for the defendant.

P. M. Keating, for the plaintiff.

HOLMES, J. This is an action of tort at common law for personal injuries. The plaintiff was employed by the defendant to remove cards as printed from a lithographic press, and to cover them with tissue paper. To do this he sat with his left side toward a revolving cylinder on which the cards were placed, and when the cylinder stopped, as it did automatically after each card was printed, he removed the card, another one was put upon it by another boy, and the cylinder revolved again. The cylinder was covered by an iron mask while revolving, which lifted just long enough for the change of cards and closed again before the new revolution. The plaintiff's hand was caught by this iron mask as it closed, and he was severely hurt. According to the plaintiff's testimony he had been using his left hand to remove the cards, that being the nearest to the cylinder,

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but one Lehan, the man immediately over him, told him to use his right. This he did, and by doing it necessarily leaned his body more to the left. The seat tipped up, threw him against the machine, and in that way caused the accident. The seat was a board four or five feet long, and was supported by four fixed iron rods fitted loosely into holes on the under side of the board, which rested on them unattached. There was evidence that the rods were three or four inches from the end of the board nearest the cylinder. The distance between the end of the board and the cylinder was twelve or fourteen inches. The plaintiff had a verdict, and the case is here on the defendant's exceptions, the most important of which is to the judge's refusal to take the case from the jury. The others are to the admission of evidence.

We are of opinion that the plaintiff is entitled to retain his verdict. A seat such as we have described in connection with the automatically opening and shutting jaw of the cylinder mask make as clear a case of a trap as can be imagined, especially when the sitter is directed to do an act most likely to cause the seat to tip at the very moment when the jaw opens and shuts. It appears from the plaintiff's testimony that he did not know of the liability of the board to behave as it did, and the risk seems to us far from obvious. The amount of leverage of the projecting edge of the board could be ascertained only by looking under the seat, and there was nothing calling on the plaintiff to do that unless he knew that the board was unattached. On the other hand, the arrangement of the structure was a matter which at least the jury well might have found that the defendant knew, or ought to have known, even apart from the fact that it was known to the man Lehan, who gave the plaintiff the order or instruction how to sit.

The negligent order of a servant for which the defendant was held not liable in *Kalleck* v. *Deering*, 161 Mass. 469, was an order to do a transitory act in the use of a contrivance for which the defendant was not responsible. So *Moody* v. *Hamilton Manuf. Co.* 159 Mass. 70, was a case of an order to do a transitory act in moving a carboy of vitriol which broke. And in *O'Brien* v. *Rideout*, 161 Mass. 170, the order set the plaintiff to different work from that for which the defendant hired him.

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But whether the direction of Lehan be called an order or an instruction, it concerned the mode of using the permanent machinery for which the defendant was responsible; and if it was an order, the defendant might be held liable for not seeing that the plaintiff was warned in connection with the duty imposed upon him, if it was an instruction, for leading him into a trap. Possibly the plaintiff's injury might be attributed to the defendant's maintaining the trap, even if its responsibility was in no way affected or enlarged by Lehan's words. The defendant might be held answerable, whatever the particular accident which led to the plaintiff's throwing his weight on the end of the board.

An exception was taken to evidence showing that the seat had tipped before, and that Lehan knew it. Lehan was the person deputed to instruct and authorized to order the plaintiff. His knowledge when giving instructions or orders was the knowledge of the defendant, and could be proved, even if superfluous. The fact that the seat had tipped before when a boy was working upon it was admissible, without more special evidence of the circumstances. The jury would have been warranted in presuming that they were similar enough to the present to be instructive as to what happened to the plaintiff, and to show that the accident was one that ought to have been looked out for. *Flaherty* v. *Powers*, 167 Mass. 61, 63.

Exception was taken to a question put to a witness as to orders given by Lehan, as a means of showing that he had authority by the fact of his exercising it. We perceive no reason for the objection, or for any other objection to the evidence admitted.

Exceptions overruled.

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WILLIAM G. HARRIS *vs.* MARY J. HAYES.

Middlesex. March 15, 1898. — May 20, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Poor Debtor — Breach of Recognizance — Proof of Claim in Insolvency — Bar to Action.

The fact that a creditor has proved a claim in insolvency upon a judgment against a judgment debtor is not a bar to an action against a surety on a recognizance to appear for examination as a poor debtor, entered into by the same debtor when execution issued against him. But whether it would be ground for a continuance, or for a stay of execution until it could be ascertained what dividend the creditor would receive in the insolvency proceedings, *quære*.

CONTRACT, against the surety upon a poor debtor's recognizance. At the trial in the Superior Court, before *Sherman*, J., it was agreed that the plaintiff recovered judgment against one Hayes on March 2, 1896; that, execution having issued thereon, Hayes was cited to appear at the Municipal Court of Boston at the poor debtor session thereof, and was defaulted and arrested by the order of the court, and he thereupon entered into a recognizance with the defendant as his surety, which is the recognizance declared upon; that Hayes applied to take the oath for the relief of poor debtors at said Municipal Court on March 26, 1897; that a hearing was continued from time to time; that upon May 21, 1897, at 10 A. M., he was defaulted; that he filed his petition in the Court of Insolvency for the county of Suffolk on April 8, 1897, and that the warrant was issued returnable on April 30, 1897; that the warrant was returned on that day without service, and a new warrant was issued returnable on May 14, 1897; that Hayes filed his schedule of property and creditors on April 28, 1897; that the first publication of the new warrant was on May 6, 1897; that the first meeting of the creditors was held on May 14, 1897, when the plaintiff proved the judgment against Hayes, and that the same was allowed; that the second meeting was held on July 2, 1897, and the third meeting had been ordered for November 12, 1897, and the question of his discharge in insolvency had not yet been reached.

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The judge directed the jury to return a verdict for the plaintiff; and the defendant alleged exceptions.

E. L. Buffinton, for the defendant.

N. F. Hesseltine, for the plaintiff.

HOLMES, J. The fact that the plaintiff had proved a claim in insolvency upon a judgment against a judgment debtor is not a bar to an action against a surety on a recognizance to appear for examination as a poor debtor, entered into by the same debtor when execution issued against him. Whether it would be ground for a continuance, or for a stay of execution until it could be ascertained what dividend the plaintiff would receive in the insolvency proceedings, is not before us. It may be that it would be proper to provide for the dividend being deducted from the defendant's liability. See *Demelman* v. *Hunt*, 168 Mass. 102.

Exceptions overruled.

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LYSANDER N. PAINE & another *vs.* JOSEPH S. SILVA.

Suffolk. March 15, 1898. — May 20, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Contract — Liability of Owner of Fishing Vessel for Supplies — Statute of Frauds.

At the trial of an action of contract against one of two owners of a vessel to recover for supplies furnished for a fishing voyage, there was evidence that the vessel was sailed on a certain lay, by which the master received a commission from the proceeds of the fish caught, after which, subject to certain deductions known as great generals, the balance of the proceeds was divided between the owners and the crew in a fixed proportion; that certain articles selected by the defendant and the captain were bought by the defendant, and others were subsequently bought by the captain in the absence of the defendant; that some payments on account were made by the captain, and others by the manager for the owners; that the defendant urged the plaintiff to get his money out of the captain, and said, "Every dollar that you get out of that captain saves me one"; that according to the understanding between the parties all the articles, with one or two exceptions which were charged to the vessel and owners, were charged to the great generals; and that the plaintiff looked to the owners for his pay. *Held*, that under that lay the master was not owner *pro hac vice*. *Held, also*, that there was evidence that the defendant made himself a debtor for the goods, and that his oral promise to pay therefor was not within the statute of frauds.

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CONTRACT, against one of two owners of the schooner Gertie Winsor, to recover for supplies furnished for a fishing voyage. After the former decision in this case, reported in 168 Mass. 432, it was tried again in the Superior Court, before *Hammond*, J., who allowed a bill of exceptions in substance as follows.

The vessel was sailed on what is called the Provincetown lay, by which the owners of the vessel furnish the vessel and its equipment, and from the gross proceeds of the fish caught the master receives a commission of two and one half to three per cent, after which the great generals are deducted, and from the residue the owners of the vessel receive a percentage, the small generals are deducted, and the crew is paid. The fishing gear is included in the great generals, and is deducted from the proceeds of a catch before the owners receive a percentage thereof. One of the plaintiffs testified that in December, 1894, or January, 1895, the defendant came to his store accompanied by a person who was to be the captain of the Gertie Winsor for that year, and said that he wanted some gear for the Gertie Winsor, one quarter of which he desired should be charged directly to the owners of the vessel and the balance to the crew, and that, if the crew were unable to pay, the plaintiffs could look to the captain of the vessel. The defendant expressed doubts as to the financial ability of the new captain, and suggested that he would take the defendant for security; to which the defendant replied that he was not going in the vessel, and would not be there when the voyage was settled, and that if he had to be in any way responsible the gear had better be charged to the great generals, in which case as part owner he would have to pay his share. Thereupon certain articles selected by the defendant and the captain were bought by the defendant, and subsequently goods were ordered from time to time by the same captain, and, in the absence of the defendant, by a new captain. Some of the payments on account of the goods ordered were paid by the captain, and one was paid by the defendant's manager. Toward the close of the fishing season, the witness having told the defendant that the bills which were charged to the great generals were getting larger rather than smaller, the defendant said that he intended to have the captain take out more money from each trip for the payment of the bill,

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and asked the witness to go to Adams, the manager, and inform him of the conversation, and upon his doing so Adams said, "You send me a bill of the indebtedness of the great generals." The witness further testified that on a late occasion the defendant came to his store and asked if the bill was being paid, and on being informed that it was growing worse, asked the witness to try to get the captain to reduce the bill, saying, "Every dollar that you get out of that captain saves me one"; that the understanding was that the goods were to be charged to the great generals, and the witness looked to the owners for his pay; that all the goods were charged to the great generals, except certain rigging and oars, which were charged to the vessel and owners. This was all the material evidence in the case.

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

W. A. Morse, for the defendant, submitted the case on a brief.

S. R. Jones, for the plaintiffs.

HOLMES, J. This bill of exceptions substantially repeats the case which was here after the former trial, but this time the defendant excepts. *Paine* v. *Silva*, 168 Mass. 432. The plaintiffs' evidence was more explicit than before to conversations during the time covered by the bill, which showed that the defendant contemplated the continuous furnishing of goods to the vessel, and the charging of them to the owners, either directly or through a charge to great generals. The brief submitted for the defendant, after repeating the argument previously addressed to us, adds the suggestion that the master was owner *pro hac vice* under the Provincetown lay, a suggestion which is taken from the former decision, where it was made and repudiated. There is a further suggestion that the defendant's promise, if any, was a promise to answer for the debts of the master, and therefore was not binding because not in writing. But the ground on which the plaintiff was allowed to go to the jury was that there was evidence that the defendant made himself a debtor for the goods. There is nothing else worth mentioning.

Exceptions overruled.

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EDWARD K. THAYER *vs.* ERASTUS B. BADGER, administrator.

Suffolk. March 16, 1898. — May 20, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Surviving Partner — Commission on Sale of Merchandise to New Firm — Law and Fact.

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It is not an absolute rule of law that a surviving partner has no right to turn over merchandise of the late firm to a new firm of which he is a member, to be sold under commission by the latter, and that the commission charged, or at least the surviving partner's share, should not be allowed in the account between him and the executor of his deceased partner.

CONTRACT, by the surviving partner of the firm of Hayden and Thayer, to recover a balance alleged to be due from the defendant, as administrator of the estate of his deceased partner, on the settlement of the firm's affairs.

The case was submitted to an auditor, and the sole question was whether the plaintiff had a right to pay a commission to the new firm of Thayer, Owen, and Tyler, of which he was a member, for selling the property of the firm of Hayden and Thayer in liquidation. The auditor found "as a fact, that the method adopted by the surviving partner in disposing of the merchandise of the old firm in the course of the settlement of the affairs of that firm was a prudent and reasonable one; that the charge for selling merchandise made by the new firm was a reasonable one; and ruled, as matter of law, that there was no objection under the circumstances to the charge of $650 commission made by the firm of Thayer, Owen, and Tyler for selling the merchandise of the firm of Hayden and Thayer in liquidation."

At the trial in the Superior Court, on the auditor's report alone, without a jury, before *Hardy*, J., the defendant asked a ruling that the surviving partner had no right to make any charge for winding up the affairs of the late firm, and therefore had no right to turn over the merchandise of the firm of Hayden and Thayer to be sold by the firm of which he was a member on commission, and that the sum charged by such firm as a com-

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mission for making the sale, or at least that portion of such commission which the surviving partner was entitled to as a member of said new firm, ought not to have been charged in the account. The judge declined so to rule, adopted the findings of the auditor, and found for the plaintiff; and the defendant alleged exceptions.

The judge reported the case for the determination of this court. If the ruling was right, the finding was to stand; if wrong, a new trial was to be granted.

H. W. Ogden, for the defendant.

H. N. Berry, for the plaintiff.

HOLMES, J. The only question in this case is whether the judge below was bound to rule, as matter of law, that a surviving partner has no right to turn over merchandise of the late firm to a new firm of which he is a member, to be sold upon commission by the latter, and that the commission charged, or at least the surviving partner's share, should not be allowed in the account between him and the executor of his deceased partner. In this case the auditor has found that the course adopted was prudent and reasonable, and the charge reasonable. Whether we should have made the same findings we cannot tell, but, they having been made and we being bound by them, we are not disposed to go so far as to say that it is impossible that the charge should have been justified by the saving to the old firm and the trouble to the new from the arrangement. It is true, no doubt, that there is a disinclination to allow pay to a surviving partner for winding up; *Dunlap* v. *Watson*, 124 Mass. 305; but the tendency is to deal with such questions on their particular circumstances, rather than by absolute rules. *Turnbull* v. *Pomeroy*, 140 Mass. 117, 118. *Robinson* v. *Simmons*, 146 Mass. 167, 176.

Finding to stand.

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JOHN F. SIMMONS *vs.* LYMAN H. RICHARDS.

Plymouth. March 17, 1898. — May 20, 1898.

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Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

False Return on Execution — Recognizance — False Arrest — Question for the Jury.

Where, in an action by A. against B., a deputy sheriff, for making a false return upon an execution against C., who had been arrested by B. thereon and for whose appearance A. had recognized, it appears that A. could not defend against the recognizance by contradicting B.'s return of an arrest of C. in that as to parties and privies the return was conclusive, A. was injured by that return, if it was false, and the case should be submitted to the jury.

TORT, against a deputy sheriff, for making a false return upon an execution against one Underwood and others, in favor of one Kellogg. At the trial in the Superior Court, before *Braley*, J., it appeared that Underwood was arrested by the defendant on the execution and the plaintiff recognized for his appearance, and that Underwood defaulted, and a judgment was obtained against the plaintiff upon the recognizance. The defendant requested the judge to rule that, upon all the evidence, the plaintiff was not entitled to recover; the judge refused so to rule, and, the jury having returned a verdict for the plaintiff, reported the case for the determination of this court. If the ruling was right, judgment was to be entered upon the verdict; otherwise, judgment was to be entered for the defendant. The facts appear in the opinion.

M. Coggan & E. S. Page, for the defendant.

H. Kingman & D. E. Damon, for the plaintiff.

ALLEN, J. An arrest may be made without actually touching the person. It is enough if the party is within the power of the officer, and submits to the arrest. *Mowry* v. *Chase*, 100 Mass. 79, 85. The evidence in the present case was sufficient to warrant the finding of an arrest on June 14. There was testimony that the defendant went to Underwood's house in the evening, said he had an execution for his arrest, showed it to him, asked him what he was going to do, said he would have to take him to

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jail, and told him that he had an assistant in attendance whom he could leave with him that night; that the defendant with his assistant went with Underwood by the latter's request to station No. 2, where Underwood in the defendant's presence told the sergeant, and afterwards the chief of police, that he was under arrest, which was not contradicted by the defendant; and finally that the defendant let him go, upon assurances that he would come to the defendant's office the next morning. Without detailing further testimony, the jury might find from the above that the defendant intended to take Underwood into his custody, and had him within his power, that Underwood submitted to the arrest, and that the defendant voluntarily discharged him.

If that was so done, the defendant had no authority to arrest Underwood again on the same execution, and the arrest on June 27 was illegal. This is conceded by the defendant. *Houghton* v. *Wilson*, 10 Gray, 365.

If the second arrest was illegal, the recognizance would be invalid provided the facts showing the illegality appeared of record, and in such case the surety upon the recognizance might have maintained his defence when sued upon it. *Smith* v. *Bean*, 130 Mass. 298. *Lane* v. *Holman*, 145 Mass. 221. But no facts appeared of record showing that the second arrest was illegal. The officer's return upon the execution set forth only the arrest of June 27. Assuming that there had been an arrest on June 14, this was a false return. This also is conceded by the defendant. *Brinley* v. *Allen*, 3 Mass. 561. *Bean* v. *Parker*, 17 Mass. 591, 601.

Nevertheless, the defendant contends that he is not liable to the plaintiff, though he might have been to the judgment creditor or to Underwood. The situation was this. The defendant took Underwood before the District Court by virtue of an execution upon which he returned an arrest. So far as the papers showed, everything was in due form, and the arrest was legal. Thereupon Underwood entered into the recognizance, with the present plaintiff as surety. Moreover, if it is material, there was evidence tending to show that the present plaintiff was not then aware of the prior arrest. Under this state of things, when suit was brought on the recognizance after Underwood had made default thereon, neither Underwood nor the present

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plaintiff, in defence, could be allowed to contradict the defendant's return of an arrest on June 27. As to parties and privies, the return was conclusive. *Lowery* v. *Caldwell*, 139 Mass. 88, and cases there cited. *Sawyer* v. *Harmon*, 136 Mass. 414. *Stewart* v. *Griswold*, 134 Mass. 391. *Baker* v. *Baker*, 125 Mass. 7. *Pullen* v. *Haynes*, 11 Gray, 379. *Lang* v. *Bunker*, 1 Allen, 256. In applying this familiar rule, it was held in *Bean* v. *Parker*, 17 Mass. 591, that bail, being sued, cannot deny the arrest of the principal, if the officer has returned such an arrest; and in *Winchel* v. *Stiles*, 15 Mass. 230, that bail, being sued, cannot be allowed to show that the judgment debtor did not avoid, but might have been found, the officer having returned *non est inventus* on the execution.

Since the plaintiff could not defend against the recognizance by contradicting the defendant's return of an arrest, he was injured by that return if it was false, and it was therefore proper to submit the case to the jury. *Brinley* v. *Allen*, 3 Mass. 561. *Whitaker* v. *Sumner*, 7 Pick. 551. *Sexton* v. *Nevers*, 20 Pick. 451, 454.

According to the terms of the report the entry must be,

Judgment on the verdict.

JOHN QUIN *vs.* BAY STATE DISTILLING COMPANY.

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Middlesex. March 14, 1898. — May 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Contract — Findings of Fact — Auditor's Report — Right to terminate Contract — Action — Interest.

Where requests for rulings, which are refused, are founded upon an assumption that certain facts are proved in the case, if there was any evidence which would warrant a different finding of the facts, it must be assumed, upon exceptions, that they were so found.

An auditor's report in favor of the plaintiff is enough to warrant a finding of the judge for the plaintiff, and his refusal to give rulings requested by the defendant, unless the findings in the report or the other facts stated are necessarily inconsistent with the refusal and the result.

A contract between A. and B., by which A. is to furnish labor and materials and

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superintend work in the erection and repair of buildings for B. so long as both parties shall see fit to continue the arrangement, A. being at no time under a contract to erect a particular building and B. being at no time bound by contract to permit him to complete a particular building, is terminable by either of them at pleasure, and A., having elected to terminate it, may immediately maintain an action upon an account annexed for that which is due him, including merchandise which he has bought and furnished, but has not paid for, with interest from the date of the writ; and the contention that he cannot recover for his services because he failed to render a true account is disposed of by the finding of an auditor that he was not bound by his contract to do any more than he did.

CONTRACT, upon an account annexed, for labor and materials furnished in the erection and repair of buildings on land of the defendant in Cambridge. Writ dated January 22, 1895. Trial in the Superior Court, without a jury, before *Richardson*, J., who allowed a bill of exceptions, in substance as follows.

The case was referred to an auditor, who found and reported the following facts.

The plaintiff is a carpenter and builder, and has been engaged in that business from thirty-five to forty years. He was employed by one Sortwell in Cambridge for fifteen or twenty years in building houses for him, and doing his work in connection with the distillery business, which he carried on in the location of the defendant company, and to which company he sold the property now owned by it. After this conveyance the defendant determined to enlarge its works and increase its business, and it was in the enlargement of the plant by repairs and by the erection of new buildings that the labor was performed and the materials furnished which are the subject of this action. The work was performed and the materials furnished between October, 1893, and January, 1895. The account annexed to the original declaration commenced in October, 1894, and contained debit items down to and including January, 1895, but no credit items, and claimed an indebtedness by the defendant to the plaintiff of $17,979.54.

Early in the hearing it appeared that there had been labor and materials furnished by the plaintiff to the defendant running over a period of about one year prior to the date of the first item in his original account annexed, and that large sums of money, aggregating more than $50,000, had been paid thereon; and it was discovered that no just accounting could be had be-

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tween the parties without going back to the examination of the work, and taking the amount of all the labor performed and materials furnished, and also an account of all moneys paid by the defendant to the plaintiff thereon; and it was agreed by the parties that the plaintiff should amend his declaration so as to cover all items from the beginning of the work, on or about November 1, 1893. Thereupon the plaintiff filed an amended account annexed, covering the different items of labor and materials from November 1, 1893, and embracing 1,857 items, but without any items of credit.

The case for the plaintiff was opened, and the testimony proceeded through several hearings upon the theory that the plaintiff was to do this work and render a monthly account to the defendant for merchandise purchased and labor performed at the cost price, the plaintiff to receive pay by the day; and the items in the account annexed, so far as they were proved item by item, were proved upon that theory.

After hearings upon the first amended declaration it was discovered that the charges made for labor and materials in such amended declaration were not made upon that basis, but were made upon the basis of an ordinary jobber's contract; that is, the plaintiff had charged the profit upon the lumber and materials that he had purchased, and also a profit on the labor furnished by him. It then appeared that the original understanding and contract, so far as there was any between the parties, was that the work should be done on that basis. It appeared subsequently that that understanding or contract was modified verbally between one Sibley, representing the defendant, and the plaintiff, and that such modified contract should date from the beginning of the work. "This modification left the contract in substance and legal effect that the plaintiff, under the directions of Mr. Sibley and an architect whom the defendant had employed (Mr. Breden), should go ahead and make such repairs and erections as they should order at cost price, and that he, the plaintiff, should have a commission upon the expenditures for his services. This commission was left indefinite, and never agreed upon in terms, except that the plaintiff, after several conversations with Mr. Sibley, told him that he, the plaintiff, thought that ten per cent upon the expenditures would be

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a fair compensation. To this Mr. Sibley neither assented nor dissented, and thereafter the plaintiff proceeded with his work with no other or further understanding as to compensation, and it is upon such a contract between the parties that this case was finally presented to me."

This required a recasting and reforming of the entire account, which was done, resulting in a second amended account annexed. Hearings were had upon this account, until it was discovered that a large number of items covering the whole period, notably labor items, were still charged upon a different basis; and a third amendment, called Schedule A, was thereupon made. Further hearings were had, and it was discovered that the plaintiff had not given the defendant the benefit of discounts allowed on the purchase of materials, and that there were a large number of unexplained charges not in conformity with the agreement. By the auditor's direction a fourth amendment, called Schedule B, was thereupon prepared, showing all such discounts and charges. The case then proceeded for four days, when the auditor found the account so incorrect that he suspended the hearings until all the accounts should be re-examined and restated by competent persons. The plaintiff's son, who had kept the books, and the stenographer, who had reported the evidence, performed this work between March 20 and November 10, 1896, and as a result a revision of the items in the second amended declaration was presented, giving a classification of the accounts.

Subsequently it was discovered that certain items for work and materials included in the second amended declaration were furnished on and after the date of the writ, and it was agreed that a schedule of those items should be made, which was done. These items were disallowed by the auditor.

Afterwards cross-examination elicited the fact that a large part of the materials for which the plaintiff seeks to recover had not been paid for by the plaintiff prior to the date of his writ, and it was agreed that a schedule of those items should be prepared, which was done, and the same was presented to the auditor and admitted in evidence. These items amounted to $9,669.10, and were allowed. This was called Schedule C.

The plaintiff was familiar with Sortwell's business, and to a

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certain extent with the buildings necessary for the transaction of such business. He was found there by the defendant when it purchased the property, and so far as appears was the only person who was well acquainted with the property, and to a certain extent with the needs of the business. He retained his position, and when the defendant determined to enlarge its plant he was given such instructions as would imply to his mind that he was to continue practically the same as he had been doing in the employ of Sortwell; at least, so he understood it. When the change in the form of the employment was made, a reason given was that Sibley did not like the appearance of a large amount of bills coming from the superintendent of the company in his name. It was distinctly stated that the work was to be done at cost by the plaintiff. The plaintiff understood from that that he was to charge the ordinary contractor's profit upon the labor of his men, and the cost to him of his merchandise. He understood also that he was to hire carpenters and laborers, and purchase the necessary materials and become responsible for them, the same as under the former arrangement.

"From all the evidence I find that this contract was to make such repairs and erect such buildings as the defendant or its agents, duly authorized, should instruct the plaintiff to prepare and erect; that he should employ labor and furnish the materials at cost, and that this means that he should charge no profit thereon, and that he should receive some suitable sum for superintendence of this work.

"From all the testimony I find that it was understood between the parties that he should receive ten per cent of the amount expended for his services as superintendent in the repair and erection of the works, and that this sum included bookkeeping, whether done by himself or by any other person."

The auditor, after making certain deductions for errors and overcharges, found that the plaintiff was entitled to recover $14,381.02, with interest from the date of the writ.

In addition to the facts stated in the auditor's report, the following facts appeared.

From bills introduced in evidence, and the schedules annexed to the auditor's report, it appeared that the bills rendered under date of September 1, 1894, were a revised statement of accounts

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covering all transactions prior to that date. The accounts rendered thereafter by the plaintiff to the defendant on or about the first day of each month covered the transactions during the preceding month. These accounts, so far as they covered the expenditures for labor or articles from the plaintiff's own shop, and similar purchases of merchandise, were rendered in the name of the plaintiff to the defendant. So far as these bills covered merchandise furnished in large quantities, as lumber or bricks, the bills were rendered to the defendant in the name of the dealer who furnished such materials.

At the time of the commencement of this action, no bill whatever had been rendered for labor or materials furnished after December 31, 1894. It also appeared that bills for all the aforesaid merchandise were rendered to the plaintiff, with a few exceptions, mostly of small amount. The first account rendered to the defendant for the plaintiff's services was rendered after the date of the writ.

The original declaration corresponded with the accounts rendered by the plaintiff to the defendant, covering items from October, 1894, to December 31, 1894. The first amended declaration corresponded with the revised accounts rendered by the plaintiff from September 1, 1894, after the modification of the contract, and those subsequently rendered to the defendant from time to time up to January 1, 1895. The first amended declaration differed from the original declaration only in that it covered also items from the beginning up to the date of the first item in the original declaration.

It appeared that the account, so far as rendered prior to the commencement of the suit, and as set forth in the original and first amended declarations, was not a correct account of the labor and materials furnished the defendant, and that the extensive accounting undertaken before the master, and at his suggestion, by the accountants, was necessary to ascertain the actual cost of the labor and materials furnished to the defendant by and through the plaintiff.

The second amended declaration, and the several schedules amendatory thereof, were designed to present the corrections of the original bills so as to conform with the facts as actually found; but the second amended declaration and the amendatory

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schedules, like the first amended declaration, were found to state incorrectly, in very many particulars, the cost of labor and materials.

Upon the facts found by the auditor, and the additional facts appearing at the trial as above stated, the defendant requested the judge to rule as follows:

"1. The action cannot be maintained, having been brought prematurely.

"2. The plaintiff cannot recover on the items of merchandise which were not paid for (if at all) until after the date of the writ, appearing by Schedule C, revising second amended declaration and aggregating $9,669.10.

"3. If the plaintiff could otherwise recover on the items contained in Schedule C, revising second amended declaration, aggregating $9,669.10, they cannot be recovered under this declaration, which contains only a count upon an account annexed.

"4. The plaintiff cannot recover for his services in this action, because it was commenced before the work had been completed or abandoned, and also because the plaintiff had not prior to the date of the writ rendered a proper account, and made a demand for payment on account of services.

"5. The plaintiff cannot recover for his own services in this action, because he did not prior to the date of the writ render a proper account of the money received from the defendant, and of the indebtedness incurred.

"6. Even if the court should find that the compensation agreed to be paid to the plaintiff was ten per cent, he cannot recover the full amount, because it appears from the auditor's report and the undisputed testimony that it was a part of the duty assumed by the plaintiff to keep and render proper accounts, and this had not been done prior to the accounting before the master.

"7. The plaintiff cannot recover interest on the amount found to be due from the date of the writ, because, as appears by the auditor's report and the undisputed testimony, it was a part of the duty assumed by the plaintiff to keep and render proper accounts, and the plaintiff had not rendered any proper account showing moneys due, and the extensive accounting before the

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auditor was necessary in order to ascertain the amounts actually due the plaintiff."

The judge declined to give any of the rulings requested, and ruled that the plaintiff could not recover for any services rendered or goods sold after the date of the writ, and found for the plaintiff in the sum of $16,684.28, being the amount found by the auditor, and interest thereon to the date of the finding.

The defendant alleged exceptions.

L. D. Brandeis, for the defendant.

W. H. Atwood, for the plaintiff.

KNOWLTON, J. The exceptions in this case are all to the refusal of the judge to make certain rulings requested by the defendant, and to his finding for the plaintiff. Most of these requests are founded upon an assumption that certain facts are proved in the case. If there was any evidence which would warrant a different finding of the facts, it must be assumed that they were so found. The auditor's report in favor of the plaintiff is enough to warrant the finding of the judge and his refusal to give the rulings requested, unless the findings in the report or the other facts stated are necessarily inconsistent with the refusal and the result.

In one part of the report the contract on which the action is founded is stated as follows: "This modification left the contract in substance and legal effect that the plaintiff, under the directions of Mr. Sibley and an architect whom the defendant had employed (Mr. Breden), should go ahead and make such repairs and erections as they should order at cost price, and that he, the plaintiff, should have a commission upon the expenditures for his services. This commission was left indefinite, and never agreed upon in terms, except that the plaintiff, after several conversations with Mr. Sibley, told him that he, the plaintiff, thought that ten per cent upon the expenditures would be a fair compensation. To this Mr. Sibley neither assented nor dissented, and thereafter the plaintiff proceeded with his work with no other or further understanding as to compensation, and it is upon such a contract between the parties that this case was finally presented to me." In another part of the report he says: "I find that this contract was to make such repairs and erect such buildings as the defendant or its agents, duly authorized,

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should instruct the plaintiff to prepare and erect; that he should employ labor and furnish the materials at cost, and that this means that he should charge no profit thereon, and that he should receive some suitable sum for superintendence of this work." We understand that this was an arrangement to furnish labor and materials and superintend work in the erection and repair of buildings so long as both parties should see fit to continue the arrangement, and that the plaintiff was at no time under a contract to build a particular building, and that the defendant was at no time bound by contract to permit him to complete a particular building. The plaintiff had been for a long time continuously in the service of the defendant's predecessor in business, and his arrangement with the defendant apparently was for a continuous service. So far as there was a contract at all, it ran into the future for an indefinite period, applying not to any particular buildings, but to such buildings as the plaintiff might be directed to work upon. It cannot be held to have bound the parties to continue their relations forever. It was, therefore, terminable by either of them at pleasure. The plaintiff, having elected to terminate it, could immediately maintain an action for that which was due him, and the judge rightly refused to rule that the action was prematurely brought.

There was no such express contract as would prevent the plaintiff, after electing to terminate the arrangement, from maintaining an action on an account annexed, and the defendant's request, founded on the form of the declaration, was rightly refused. *Morse* v. *Potter*, 4 Gray, 292. *Charman* v. *Henshaw*, 15 Gray, 293. *Morse* v. *Sherman*, 106 Mass. 430, 432. *Lovell* v. *Earle*, 127 Mass. 546.

Under this agreement the plaintiff was entitled to recover as well for merchandise which the plaintiff bought and furnished, but had not paid for, as for that which he had paid for.

The defendant's contention that the plaintiff cannot recover for his services because he failed to render a true account is disposed of by the finding of the auditor that the plaintiff was not bound by his contract to do anything more than he did.

There is nothing in the case to take it out of the ordinary rule that, where the debt was not payable at an earlier time,

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interest upon the amount found due is to be allowed from the date of the writ. *Dodge* v. *Perkins*, 9 Pick. 368, 388. *Foote* v. *Blanchard*, 6 Allen, 221. *Exceptions overruled.*

BARNABAS CLARKE *vs.* CHARLES H. BACALL.

Suffolk. March 16, 17, 1898. — May 20, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Municipal Court of Boston — Petition to vacate Judgment — Writ of Review — Appeal — Practice.

All the considerations in favor of holding that an appeal may be taken from a judgment of the Municipal Court of Boston dismissing a petition to have a judgment vacated under Sts. 1893, c. 396, and 1894, c. 431, are equally applicable to cases under St. 1895, c. 234, relative to vacating judgments and writs of and petitions for review.

On a petition, on appeal, from the Municipal Court of Boston to have a judgment vacated, it is error for the Superior Court to order a writ of review to be issued instead of ordering the judgment to be vacated.

PETITION, filed in the Municipal Court of Boston, to have a judgment vacated. The petition was denied, and the petitioner appealed to the Superior Court. At the hearing that court granted the petition, and ordered that a writ of review issue thereon; and the respondent alleged exceptions. The facts appear in the opinion.

A. E. Avery, for the respondent.

J. W. Corcoran, (*W. B. Sullivan* with him,) for the petitioner.

KNOWLTON, J. This is an appeal to the Superior Court from a decision of the Municipal Court of the city of Boston, denying a petition to vacate a judgment. The first exception is to the refusal of the judge to rule as follows: "This being a petition to vacate a judgment, and not a petition for a writ of review, this court has no jurisdiction over the same, and the decision of the lower court is conclusive." A petition for a writ of review is a civil action. *Davenport* v. *Holland*, 2 Cush. 1. *Winch* v. *Hosmer*, 122 Mass. 438. A petition to vacate a judgment under our statute is entered as a separate suit, like a petition for a writ of review, and is also in a broad sense a civil

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action. *Yetten* v. *Conroy*, 165 Mass. 238. Appeals in such cases in district and police courts are allowed by our statutes. St. 1893, c. 396, § 24. Pub. Sts. c. 154, §§ 39, 43. The provisions of these statutes apply also to the Municipal Court of the city of Boston. St. 1894, c. 431, § 2. The case of *Yetten* v. *Conroy*, which was decided under St. 1893, c. 396, is conclusive upon the question before us. All the considerations in favor of holding that an appeal might be taken in such a case under that statute are equally applicable to cases under St. 1895, c. 234, which relates to vacating judgments and writs and petitions for review. There is no good reason for making a distinction in this particular between a petition for a writ of review and a petition to vacate a judgment. The difference between them is in form rather than in substance.

A petition of a court refusing to vacate its own judgments or decrees may be appealed from as well as any other decision. *Gale* v. *Nickerson*, 144 Mass. 415. *Tucker* v. *Fisk*, 154 Mass. 574. *Yetten* v. *Conroy*, 165 Mass. 238. That St. 1895, c. 234, § 2, does not permit the filing of a petition for a writ of review, or to vacate a judgment, in the Supreme Judicial Court or Superior Court, when the judgment was rendered in a police, district, or municipal court, does not deprive the Superior Court of its appellate jurisdiction. Even under former statutes, a petition to vacate a judgment could be filed only in the court in which the judgment was rendered. *Stillman* v. *Donovan*, 170 Mass. 360. The ruling requested was rightly refused.

The court ordered a writ of review to issue, and the respondent excepted to this order. This exception must be sustained. The petition is to vacate the judgment, not to issue a writ of review. Upon the finding of the court the prayer of the petitioner should have been granted, and the judgment vacated. The statute provides that, upon vacating a judgment, "any appropriate proceedings may be had, as if such judgment had not been entered." St. 1895, c. 234, § 3. The order should have been that the judgment be vacated, and that an attested copy of the order be sent to the Municipal Court. On receipt of such a copy, the original case would stand for further proceedings in that court. The finding of the court in favor of the petitioner will stand, but the order that a writ of review be granted is set aside.

Exceptions sustained.

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FRANK I. LESSARD & another *vs.* INHABITANTS OF REVERE.

Suffolk. March 17, 1898. — May 20, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Mechanic's Lien for Labor in Erection of Schoolhouse.

The general words of Pub. Sts. c. 191, § 1, do not give a lien for labor upon a schoolhouse held by a town for public school purposes.

PETITION, to enforce a mechanic's lien under Pub. Sts. c. 191, for labor furnished in the erection of a schoolhouse. At the trial in the Superior Court, without a jury, before *Mason*, C. J., it appeared that the estate upon which the lien was claimed was at the time the labor was furnished held by the town of Revere for public school purposes. The judge, at the request of the respondent, ruled that no lien could be maintained upon property so held, and found for the respondent; and reported the case for the determination of this court. If the ruling was wrong, the lien was to be established for $251.15, with costs; otherwise, judgment was to be entered on the finding.

J. E. Eaton, for the petitioners.

S. R. Cutler, for the respondent.

HOLMES, J. The only question raised by the report is whether the general words of Pub. Sts. c. 191, § 1, give a lien for labor upon a schoolhouse held by a town for public school purposes. Such a lien seems to have been enforced in *Morse* v. *Newbury School District*, 8 Allen, 307, but it does not appear whether the exceptions were broad enough to present this question, and the question is not adverted to in the decision. In Kansas under like circumstances a lien was held to be created, although it was assumed that, by reason of another statute, no process could be issued to enforce it while the building remained the property of the school district. *Wilson* v. *School District*, 17 Kans. 104. See *McKnight* v. *Parish of Grant*, 30 La. An. 361. But the general current of decisions is against the lien when the property upon which it is asserted is held for public uses. *Hovey* v. *East Provi-*

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dence, 17 R. I. 80. *Leonard* v. *Brooklyn*, 71 N. Y. 498. *Brinckerhoff* v. *Board of Education*, 2 Daly, 443; *S. C.* 37 How. Pr. 499. *Patterson* v. *Pennsylvania Reform School*, 92 Penn. St. 229. *Abercrombie* v. *Ely*, 60 Mo. 23. *Fatout* v. *School Commissioners*, 102 Ind. 223, 232. *Board of Education* v. *Neidenberger*, 78 Ill. 58. *Portland Lumbering & Manuf. Co.* v. *School District*, 13 Oregon, 283. *Jordan* v. *Board of Education*, 39 Minn. 298. *Mayrhofer* v. *Board of Education*, 89 Cal. 110. *Knapp* v. *Swaney*, 56 Mich. 345, 347. *Platteville* v. *Bell*, 66 Wis. 326, 334. *Charnock* v. *District Township*, 51 Iowa, 70. *Board of Supervisors* v. *Gillen*, 59 Miss. 198. *Hall's Safe & Lock Co.* v. *Scites*, 38 W. Va. 691. Jones, Liens, § 1375. Dillon, Mun. Corp. (4th ed.) § 577. Boisot, Mechanics' Liens, § 208. Phillips, Mechanics' Liens, (3d ed.) § 179. The right to take such property on execution is denied on similar grounds. *Meriwether* v. *Garrett*, 102 U. S. 472, 501, 513, 525, 526. *Foster* v. *Fowler*, 60 Penn. St. 27, 32. *Curry* v. *Savannah*, 64 Ga. 290. See *Worcester County* v. *Worcester*, 116 Mass. 193; *Somerville* v. *Waltham*, 170 Mass. 160; *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432. When we add to the almost unanimous course of decision elsewhere, our own St. 1892, c. 270, which gives a laborer an action against a town on conditions similar to those attached to liens, a statute hardly explicable except on the assumption that it gives the only remedy available, we feel bound to construe Pub. Sts. c. 191, § 1, as not intended to apply to buildings like the schoolhouse in this case.

Judgment on the finding.

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MARY SHEEHAN *vs.* CITY OF BOSTON.
ANNIE A. SHEEHAN *vs.* SAME.

Suffolk. March 17, 1898. — May 20, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

City Ordinance a Bar to Recovery for Personal Injuries.

An ordinance of the city of Boston which provides that "No person shall, in or upon any of the public grounds, walk, stand, or lie on the grass, or coast or engage in a game of ball, football, or other athletic sport," is a bar to recovery for personal injuries occasioned to a person who, while walking across the grass on the Public Garden, and being aware that the public were warned by signs to keep off of it, falls into a deep unguarded trench which had been dug by the city for the laying of water pipes.

TWO ACTIONS OF TORT, for personal injuries. Trial in the Superior Court, before *Gaskill*, J., who, at the defendant's request, directed verdicts in each case for the defendant; and the plaintiffs alleged exceptions, which appear in the opinion.

W. R. Bigelow, for the plaintiffs.

S. H. Hudson, for the defendant.

HOLMES, J. These are actions of tort, for personal injuries suffered by falling into a trench in the Public Garden in Boston. The plaintiffs had been sitting upon a movable settee, which they found upon the grass a little way from the path, in the neighborhood of an arbor near the corner of Boylston and Arlington Streets. They had risen and were walking across the grass toward the Newbury Street exit from the garden, when before they reached a path they fell into the trench. This trench had been dug by the city for the laying of water pipes, and was some ten feet deep, and was not guarded. The ordinances of the city forbade walking on the grass, and the public were warned by signs to keep off it, as the plaintiffs knew.* The judge before whom the case was tried directed verdicts for the defendant, and the plaintiffs excepted.

* Chapter 43, § 67, of the city ordinances provides that "No person shall, in or upon any of the public grounds, walk, stand, or lie on the grass, or coast, or engage in a game of ball, football, or other athletic sport, except in accordance with a permit from the mayor."

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The ruling plainly was right. The plaintiffs were obliged to show their own breach of the law in order to recover, (*Tuttle* v. *Lawrence*, 119 Mass. 276, *Arey* v. *Newton*, 148 Mass. 598, and *Breuck* v. *Holyoke*, 167 Mass. 258,) and to show that they were in a place where they not only were not invited, but were forbidden to be, and where therefore the defendant was not bound to expect them or to make provisions for their safety. The presence of movable seats upon the grass did not repeal the ordinance, or enlarge the rights of the plaintiffs or the liabilities of the defendant. As every one knows, the most probable explanation was that the seats had been put there by some of the public at their own risk. *Exceptions overruled.*

EDWARD FOX *vs.* CITY OF CHELSEA. 171 297 172 125

EDWARD FOX, administrator, *vs.* SAME. 171 297 177 416

Suffolk. March 18, 1898. — May 20, 1898. 171 297 186 118 186 548

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ. 171 297 188 314

Personal Injuries — Negligence of Water Commissioners — Liability of City — Due Care — Law and Fact — Instructions — Exceptions — New Trial — Discretion of Justice. 171 297 190 198 171 297 191 292 191 367

If the water commissioners of a city, in digging a trench for the purpose of laying pipes to supply the inhabitants with water, act as agents of the city, and are negligent in not sufficiently lighting the excavation and in not maintaining proper barriers to keep travellers from walking into it, the city is liable for injuries caused by such negligence.

Upon a bill of exceptions this court cannot pass on the weight of the evidence, if there was any evidence which tended to establish the facts found by the jury.

Where a person, in going from the sidewalk of a street towards a street car to get upon it after dark, is injured by falling into a trench between the curbstone and the railway track made for the purpose of laying water pipes, if, in an action for his injury, there is evidence tending to show that the excavation was insufficiently lighted and proper barriers were not maintained, the question of his due care is for the jury.

If a person, in going from the sidewalk of a street towards a street car to get upon it after dark, is injured by falling into a trench between the curbstone and the railway track made for the purpose of laying water pipes, the city, in an action against it for the injury, is not entitled to have the jury instructed that "only those using streets for legitimate purposes, in the usual and ordinary mode, can claim indemnity for injuries caused solely by defects in high-

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ways," and that, if the plaintiff, at the time of his injury, was using the street in an extraordinary mode, the action could not be maintained.

In an action for personal injuries received, in going from the sidewalk of a street towards a street car to get upon it after dark, by falling into a trench between the curbstone and the railway track, made for the purpose of laying water pipes, the judge refused to instruct the jury, as requested by the defendant, that if the jury found that the plaintiff "received the injuries complained of while voluntarily attempting to pass over a dangerous place, knowing it to be dangerous, or which, by the exercise of ordinary prudence," he "ought to have known to be dangerous, those facts would be conclusive evidence of want of due care on his part"; and instructed them that, if the plaintiff knew that the trench was there, and voluntarily walked into it, he could not recover. *Held*, that the defendant had no ground of exception.

In an action against a city for personal injuries received, in going from the sidewalk of a street towards a street car to get upon it after dark, by falling into a trench between the curbstone and the railway track made for the purpose of laying water pipes, the defendant is not entitled to have the jury instructed that, "where barriers have been placed by a city along and about a trench dug in its street, to guard it against travellers falling into the trench, and have been removed by a stranger during the night, and during that night, and before the city has any knowledge or notice of such removal, a traveller on the street walks or falls into the trench" and is injured, he cannot maintain an action against the city.

An order overruling a motion for a new trial is within the discretion of the judge, and is not a subject for an exception.

TWO ACTIONS OF TORT, the first being for loss of the services and society of the plaintiff's wife, Sarah Fox, and for expenses incurred by him, by reason of her falling into a trench in Everett Avenue in the defendant city; and the second being for personal injuries sustained by her at the time of such accident, which resulted in her death. The cases were tried together in the Superior Court, before *Hardy*, J.

The jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions. The facts appear in the opinion.

E. O. Bicknell, (*G. M. Stearns* with him,) for the defendant.

S. L. Whipple & D. T. Montague, (*W. Keyes* with them,) for the plaintiff.

KNOWLTON, J. The plaintiff brings one of these actions in his own right, and the other as administrator of the estate of his deceased wife, to recover damages growing out of her fall into a ditch dug by the water commissioners of Chelsea in one of the principal streets of that city.

It was undisputed that a series of excavations had been made

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under the direction of the water commissioners along Everett Avenue between the street railway track and the curbstone near the junction of Broadway and Everett Avenue, for the purpose of laying water pipes to supply the inhabitants with water. At about ten o'clock in the evening an electric car had come from Everett through Everett Avenue, and had encountered a disabled car which it pushed down to a point near the crosswalk at the junction of the avenue with Broadway, where it stopped and was about to return. The conductor called out, "Car for Everett, Malden, and Melrose," and the plaintiff and his wife, who were then a short distance away on Broadway, started in the direction of the car, passed from the corner of Broadway and Everett Avenue a short distance up on the westerly side of Everett Avenue, and then went from the sidewalk towards the car to get upon it, when the plaintiff's wife fell into the trench and was injured. There was a conflict of testimony in regard to the light at that point. Three witnesses testified that it was very dark, and there was evidence tending to show that between the two lanterns set upon the horse just by the crosswalk at the junction of the streets, and a lantern some distance beyond the second car going towards Everett, there was no light. There was an electric light near the junction of the streets, but there was some testimony that it was then rather dim, and the evidence tended to show that the two cars with curtains down on one side cut off the light which otherwise would have come to the place of the accident. A watchman, who was stationed there to look after the lights and see that travellers were warned against the excavations, had gone away for a while to a position about three hundred feet from the place of the accident. There was some evidence that one lantern which had been relied on to give light was, soon after the accident, found in the trench near where the plaintiff's wife fell, and other evidence tending to show that a horse put near there as a barrier had been moved out of its place. The evidence introduced by the defendant tended to show that the place was well lighted and sufficiently watched.

The evidence was ample to show that the water commissioners in digging the ditch were acting as agents of the city, and that the city was responsible for their negligence in leaving

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excavations insufficiently lighted in the streets. *Oliver* v. *Worcester*, 102 Mass. 489, 497. *Hand* v. *Brookline*, 126 Mass. 324. *Neff* v. *Wellesley*, 148 Mass. 487. *Stoddard* v. *Winchester*, 157 Mass. 567.

There was evidence which tended to show negligence in not sufficiently lighting the excavations, and in not maintaining proper barriers to keep travellers from walking into them. Upon a bill of exceptions, this court cannot pass upon the weight of evidence, if there was any evidence which tended to establish the facts found by the jury.

We are also of opinion that there was evidence for the consideration of the jury tending to show that the plaintiff's intestate was in the exercise of due care. The place was one where she well might expect that she could walk in safety. If it was as dark there as some of the witnesses testified, her fall was not necessarily inconsistent with the exercise of reasonable care. Up to the moment when she fell, she was going on in the ordinary way, apparently taking as much precaution as is usual when one has no reason to expect danger. While there was evidence tending to show that she was not as careful as she ought to have been, the question was not one of law for the court, but of fact for the jury.

The second request for instructions was rightly refused.*

* The instructions requested were as follows:

"2. Only those using streets for legitimate purposes, in the usual and ordinary mode, can claim indemnity for injuries caused solely by defects in highways, and if, at the time when the plaintiff's intestate received her alleged injuries, she was using Everett Avenue, or any part thereof, in an extraordinary mode or manner, neither of these actions can be maintained.

"3. If the jury find, by a fair preponderance of the evidence, that the plaintiff's intestate received the injuries complained of while voluntarily attempting to pass over a dangerous place, knowing it to be dangerous, or which, by the exercise of ordinary prudence, using proper foresight, and by giving reasonable heed to her steps and attention to objects before and about her she might and ought to have known to be dangerous, those facts would be conclusive evidence of want of due care on her part. . . .

"5. Where barriers have been placed by a city along and about a trench dug in its street, to guard it against travellers falling into the trench, and have been removed by a stranger during the night, and during that night, and before the city has any knowledge or notice of such removal, a traveller on the street walks or falls into the trench by reason of the removal of the barrier, and thereby receives injuries, he cannot recover damages therefor in an action against the city."

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There was no evidence that the plaintiff's intestate was using the street for an illegitimate purpose, or in a way which would deprive her of the ordinary rights of travellers.

So far as the third request was applicable to the evidence, it was given in the sense in which it was made. By the term "dangerous place," the defendant's counsel probably meant a place so dangerous that it would be improper and negligent to attempt to pass over it. In that sense of the words the request was correct. The jury were explicitly instructed that, if the plaintiff's intestate knew that this trench was there, and voluntarily walked into it, the plaintiff could not recover. This was all that the defendant could desire on this point. If the instruction were taken to mean by the word "dangerous" merely not perfectly safe, it would be incorrect. The mere fact that a way is defective does not necessarily show it to be negligence to attempt to pass over it. *Barton* v. *Springfield*, 110 Mass. 131. *McGuinness* v. *Worcester*, 160 Mass. 272.

The exception to the refusal to give the fourth instruction requested has not been argued, and we treat it as waived.

The fifth request for instructions was also rightly refused. It left out of view the duty of a city in a case like this to take proper precautions to prevent the removal of lights or barriers, or to ascertain the fact and replace them speedily if they are removed. *Prentiss* v. *Boston*, 112 Mass. 43. *Blessington* v. *Boston*, 153 Mass. 409.

The order overruling the motion for a new trial was within the discretion of the court, and was not a subject for an exception.

Exceptions overruled.

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BENJAMIN B. SEWELL, JR., *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. March 18, 1898. — May 20, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Personal Injuries occasioned by riding Bicycle into a Train — Due Care.

An action cannot be maintained for personal injuries occasioned to a boy nearly thirteen years of age who rides a bicycle headlong into a train without taking any precaution, his mind at the time being full of something else, and there being nothing to excuse him for not looking if he could see, or for not getting off his wheel and advancing cautiously if he could not see.

TORT, for personal injuries occasioned to the plaintiff by riding a bicycle into a train. Trial in the Superior Court before *Blodgett*, J., who, at the close of the evidence, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

J. O. Teele, for the plaintiff.

C. F. Choate, Jr., for the defendant.

HOLMES, J. This is an action for personal injuries caused by running into a train at a crossing. The judge directed a verdict for the defendant, and the case is here on exceptions. The plaintiff told his own story very fairly. He was nearly thirteen at the time. He was riding a bicycle along a street in Hull, called V Street, toward the seashore, and was looking straight ahead, watching for a steamer which he wanted to see. The street ran to an electric railroad and continued on the other side of it, but the crossing was private and so marked, although planked by the railroad company. The plaintiff knew of the railroad and that trains ran upon it. He paid no attention, did not look out for the cars, but rode across the first track and on the second was struck and hurt. He says that he could have stopped almost as quickly as if he had been on foot if he had looked up the track and had seen the train. He does not pretend that he was relying upon receiving warning of an approaching train, and it is not necessary to consider whether there is any evidence that the train did not give whatever warn-

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ing was usual and proper, (*Hubbard* v. *Boston & Albany Railroad*, 159 Mass. 320,) or whether it was bound to give any warning at all. The case is the simple one of a boy riding headlong into a train without taking any precaution, his mind at the time being full of something else. There is no evidence of due care on his part, as there was in *Tyler* v. *New York & New England Railroad*, 137 Mass. 238. There is nothing to excuse him for not looking if he could see, or for not getting off his wheel and advancing cautiously if he could not see. *Creamer* v. *West End Street Railway*, 156 Mass. 320, 324. *Chase* v. *Maine Central Railroad*, 167 Mass. 383, 387. *Butterfield* v. *Western Railroad*, 10 Allen, 532. *Robertson* v. *Pennsylvania Railroad*, 180 Penn. St. 43. *Exceptions overruled.*

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J. HENRY TAYLOR *vs.* ANNA J. LOVERING.

Suffolk. March 21, 1898. — May 20, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Guardian and Ward — Writ of Error — Service of Writ — Guardian ad Litem.

A petition for a writ of error to reverse a judgment against a ward should be brought in the name of the ward, by his guardian or next friend.

There is no statute which permits the service of a writ against an insane person who is under guardianship to be made upon the guardian instead of upon the ward.

The practice is to require the same service upon infants, or upon persons under guardianship or of unsound mind, as upon other defendants, and then to give notice of the proceedings to the guardian, if there be any, and he does not appear without notice; and if the guardian does not appear and defend the action in the name of his ward, or if there is no guardian, a guardian *ad litem* should be appointed for that purpose.

The practice of appointing guardians *ad litem* prevails in this Commonwealth in actions at law as well as in suits in equity.

WRIT OF ERROR, filed December 6, 1897, to reverse a judgment of the Superior Court rendered in an action of contract by the defendant in error against the plaintiff in error.

At the hearing, it appeared that the writ in the original action was dated July 15, 1897, and was returnable on the first Monday

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of September, 1897; that on July 16 and on July 19, 1897, certain property of the defendant Taylor was attached; that no service of the writ was made upon him, and that the writ was entered in the Superior Court without service upon him; that after the entry of the writ a certain order of notice, returnable on the first Monday of October, 1897, was issued by the court, directed to the defendant Taylor; that it was never served on him, but on September 18, 1897, the officer made a return thereon, stating that Taylor was confined in an insane asylum, and that he could not make service upon him, but "gave notice to Joseph Middleby, guardian of said defendant, by leaving at his last and usual place of abode a true and attested copy of the within order"; that annexed to the officer's return was a letter from the superintendent of the McLean Hospital, stating in substance that Taylor was there confined and hopelessly insane; that no appearance for the defendant was entered, and on October 19, 1897, the plaintiff moved that Taylor be defaulted for want of appearance and answer, which motion was allowed; that it did not appear that any notice of the making of the motion, or of its allowance, was given to any person representing Taylor; that on the first Monday of November, 1897, judgment was entered against Taylor in the sum of $1,577.38; and that Joseph Middleby was appointed guardian of Taylor on July 15, 1897.

J. J. Feely, for the plaintiff in error.

S. W. Forrest, for the defendant in error.

FIELD, C. J. In *Hicks* v. *Chapman*, 10 Allen, 463, 464, it is said of the office of guardian: "It is created by statute, and is in some respects unlike the office of guardian as it has existed by the common law in England. Guardians are not, like executors, administrators, or trustees, invested with a legal title to the property which is placed under their care; but they have a naked power, not coupled with an interest. The debts of the ward remain his, so that, though he has no power to pay them, yet he, and not the guardians, must be sued upon them. *Brown* v. *Chase*, 4 Mass. 436. If they defend actions brought against him, they must defend in his name and not in their own. If they bring actions, it must be in his name and not in their own, and the judgment is in his name. The proper discharge of their duties does not require them to subject them-

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selves to any personal litigation or liability for costs. It is true that they may make contracts in their own names, and such contracts bind themselves, but do not bind either the ward or his estate. *Thacher* v. *Dinsmore*, 5 Mass. 299. *Forster* v. *Fuller*, 6 Mass. 58. *Jones* v. *Brewer*, 1 Pick. 314. *Whiting* v. *Dewey*, 15 Pick. 428. *Spring* v. *Woodworth*, 4 Allen, 326." See also *Kavanaugh* v. *Kavanaugh*, 146 Mass. 40.

In the present case, therefore, the petition for the writ of error should have been brought in the name of the ward, by his guardian or next friend. The writ of error as actually issued contains the proper parties. The guardian was not a party, and could not properly have been made a party, to the original suit. *Lombard* v. *Morse*, 155 Mass. 136. See *Richmond* v. *Adams National Bank*, 152 Mass. 359.

There is no statute which permits the service of a writ against an insane person who is under guardianship to be made upon the guardian instead of upon the ward, and there was therefore no sufficient service of the writ upon the defendant in the original action. The Superior Court, on being informed that the defendant was an insane person under guardianship in this Commonwealth, properly ordered notice of the pendency of the action to be given to the guardian, and if the guardian had appeared in the action in the name of the defendant this probably would have cured the want of service upon the defendant. In *Whitcomb* v. *Jacobs*, 9 Gray, 255, it is said that the guardian should be made a party to the proceedings, but this, we think, is not strictly true in our practice; he should have notice of the proceedings. *White* v. *Palmer*, 4 Mass. 147. If the guardian having notice of the pendency of the suit does not appear and defend it in the name of his ward, a guardian *ad litem* should be appointed for that purpose. See *Emery* v. *Parrott*, 107 Mass. 95.

In the chancery practice in England, process must first be served on an infant before a guardian *ad litem* can be appointed; and this is said to be the general practice in suits against an idiot or lunatic, who has been found to be of unsound mind by inquisition. Substituted service upon the keeper of an asylum where a lunatic is confined has there been allowed in equity when service upon the patient would be injurious to him. In some of the States, service upon a committee

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or upon a guardian has been held sufficient. The cases in equity on this subject are collected in 1 Dan. Ch. Pl. & Pr. (6th Am. ed.) by Gould, 161 *et seq.* and notes, 176 *et seq.* and notes.

As our statutes concerning the service of writs and subpœnas, Pub. Sts. c. 161, §§ 29-37, contain no special provisions for service upon infants, or upon persons under guardianship or of unsound mind, the practice here, we think, has been to require the same service on them as upon other defendants. We think that this is the proper practice. Although service on an infant or on a person of unsound mind sometimes would seem to be useless, it often would be difficult to determine whether in fact it would be so or not, and it is a convenient practice to require service according to the statutes in every case, and not to appoint a guardian *ad litem* until this has been done. The practice of appointing guardians *ad litem* prevails here in actions at law, as well as in suits in equity. As there was no service of any kind upon the defendant in the original suit, and as his guardian, who was authorized by law to appear for him, did not appear in the suit, and as no guardian *ad litem* was appointed, even if it were true that such a guardian could have been appointed without service of process upon the defendant, we are of opinion that the judgment should be reversed. An insane defendant ought not to be defaulted for want of an appearance and answer to the suit. See *Van Horn* v. *Hann*, 10 Vroom, 207; *Sturges* v. *Longworth*, 1 Ohio St. 544; *Lamprey* v. *Nudd*, 29 N. H. 299, 303; *Allison* v. *Taylor*, 6 Dana, 87; *Swan* v. *Horton*, 14 Gray, 179; *Davenport* v. *Davenport*, 5 Allen, 464; *Denny* v. *Denny*, 8 Allen, 311; *Emery* v. *Parrott*, 107 Mass. 95.

Judgment reversed.

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PATRICK LYNCH *vs.* DANIEL J. MURPHY.

Middlesex. March 24, 1898. — May 20, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Deceit — False Representations — Vendor and Vendee.

Representations in regard to the value largely in the future as an investment of the stock of a company organized for the manufacture and sale of certain machines, one of which the vendee before purchasing the stock had seen in operation at the vendor's house and which he knew was not perfected, when considered in connection with the nature of the property and with the fact that the vendee must have known all the time that the vendor was one of the promoters of the corporation and greatly interested in the stock and in the sale of it, are expressions of opinion which will not sustain an action for deceit.

TORT, for deceit. Trial in the Superior Court, before *Lilley*, J., who, at the conclusion of the evidence, ruled, at the request of the defendant, that the action could not be maintained, and directed the jury to return a verdict for the defendant, and the plaintiff having alleged exceptions, reported the case for the determination of this court. If the ruling was right, judgment was to be entered on the verdict; otherwise, the case was to stand for trial. The facts appear in the opinion.

J. H. Morrison, for the plaintiff.

J. J. Hogan & J. W. McEvoy, for the defendant.

KNOWLTON, J. The plaintiff alleges that the defendant fraudulently made certain false representations in connection with the sale to him of stock in a corporation. The corporation was called the Haggerty Water Motor Company, and was organized under the laws of the State of Maine for the purpose of manufacturing and selling water motors under patents. The plaintiff testified, in cross-examination, that before he bought any stock in the company he had seen the machine in operation at the defendant's house, and that he went to look at it there. He also testified that when he purchased his stock he knew that the machine was not perfected, and that they were experimenting on it. All his testimony shows that he knew enough about the corporation to understand that the value of its stock must be largely a matter of opinion, and dependent upon future contin-

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gencies. All the alleged false representations on which he relies were in regard to the value of the stock as an investment, and related in the main, if not altogether, to the future. Considered in connection with the nature of the property, they were plainly mere expressions of opinion which, when made by a vendor, will not sustain an action for deceit. *Belcher* v. *Costello*, 122 Mass. 189. *Deming* v. *Darling*, 148 Mass. 504. *Nash* v. *Minnesota Title Ins. & Trust Co.* 159 Mass. 437, and 163 Mass. 574. *Andrews* v. *Jackson*, 168 Mass. 266.

The plaintiff bought stock at different times. The first time he bought of the defendant and of Haggerty, who was the patentee of the machine. He testified that the stock-book and certificates showed that the stock so purchased was treasury stock of the company. Afterwards he bought of one Wholey, a stockholder, and later of one Brennan, and still later he bought more of the defendant and Haggerty, which also was treasury stock, transferred to him by one Williams as trustee for the company. The report leaves it uncertain whether the stock bought of Wholey and of Brennan was or was not treasury stock. The plaintiff testified that in making both of these purchases he was influenced by the defendant's representations of value, which, as we have already said, purported to be, from their very nature, mere expressions of opinion.

The plaintiff contends that this case calls for a distinction such as was recognized in *Medbury* v. *Watson*, 6 Met. 246, 260, between representations made by a vendor and those made by an apparently disinterested third person. But we are of opinion that there is no evidence which warrants us in making such a distinction. The plaintiff knew from the beginning that the defendant was deeply interested in the stock of the corporation. In the first transaction relied on in this suit, the defendant was one of the vendors, and purported to be speaking for himself as an individual, although before the sale was consummated it appeared that he was selling treasury stock. The last transaction was of the same kind. The representations at other times were no different in character from those made in connection with these sales, and the plaintiff must have known all the time that the defendant was one of the promoters of the corporation, and greatly interested in the stock and in the sale of it.

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There are other branches of the case in which the weight of the evidence is in favor of the defendant; but without considering them, we are of opinion that a verdict was rightly ordered for him, on the ground that the only representations made by him did not purport to be anything more than statements of opinion upon which a purchaser cannot safely rely.

Judgment on the verdict.

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FRED E. CRAWFORD *vs.* DORCAS A. LANGMAID & others.

Suffolk. December 7, 1897. — May 21, 1898.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Bill in Equity to reach and apply Corpus of Trust Estate — Power of Appointment.

Under an indenture which provides that A., having conveyed his property to trustees, is to have the power of disposal of the estate by will, and, in default of appointment by will, the property is to go to his heirs, and that the trustees may retain as principal or pay over to him, discharged of all trust, the proceeds of any real estate which they may sell, A. has no interest in the corpus of the estate which can be reached by a creditor in equity under the Pub. Sts. c. 151, § 2, cl. 11, as amended by the St. of 1884, c. 285.

BILL IN EQUITY, under the Pub. Sts. c. 151, § 2, cl. 11, as amended by the St. of 1884, c. 285, by a judgment creditor of the defendant, Dorcas A. Langmaid, to reach and apply upon his debt her interest in a trust property held by the other defendants. The case was heard in the Superior Court, by *Sheldon*, J., who ruled that the plaintiff was entitled to hold the principal of the trust fund, and entered a decree directing that the defendants "forthwith convert into cash such portions of the corpus of the property mentioned in the bill of complaint as may be necessary to make the sum of $373.69," the amount of the sum due the plaintiff, with costs.

At the request of the defendants, the judge reported the case for the determination of this court, such decree to be entered as justice and equity might require. The facts appear in the opinion.

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E. R. Champlin, (*G. L. Wilson* with him,) for the defendants.

H. T. Richardson, for the plaintiff.

LATHROP, J. By two deeds, executed on the same day, Mrs. Langmaid conveyed all her property to trustees, to manage the property and to pay her the net income semiannually during her life, and on her decease "to convey and transfer the said trust estate or the residue thereof to such person or persons and such object or objects, and in such way and manner as the said Dorcas A., by her last will and testament, duly admitted to probate in the Probate Court of said Suffolk County, shall provide and direct, or in default of a duly probated will to convey and transfer said trust estate to the legal heirs and representatives of said Dorcas A., in fee, and discharged of all trusts."

The deed also gave the trustees power to sell and convey the real estate or any part of it, with the consent of Mrs. Langmaid, for such price and on such terms as the trustees should deem best, and proceeded as follows: "and the proceeds of any and every sale or mortgage may be retained by such trustees as part of the principal of the trust estate, or may be paid over in whole or in part to said Dorcas A., and her acceptance of such money shall fully release and discharge the trustees from all further accounting or liability therefor."

The judge has found that the conveyances were not made with any actual intent to defraud either the plaintiff or any other creditors, by covering up or concealing property from him or them, but were made, without any valuable consideration therefor, for the purpose of securing the property to herself and her heirs by rendering it impossible for her to sacrifice it to the importunities of a spendthrift son; and that she has received from the trustees all the future income for a long time to come, and has spent it for the benefit of her son. The plaintiff does not now contend that there was any fraud on the part of Mrs. Langmaid, and the only question is whether, under the trust deeds, aside from the income, Mrs. Langmaid retained "any property, right, title, or interest, legal or equitable," which can be applied in satisfaction of the debt.

In *Pacific National Bank* v. *Windram*, 133 Mass. 175, in which it was held that a person could not settle his property in

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trust to pay the income to himself for life with a provision that it should not be alienated by anticipation, so as to prevent his creditors from reaching the income by a bill in equity under the Gen. Sts. c. 113, § 2, cl. 11, it was said by Chief Justice Morton: "It is true that a man, who is not indebted, may by a voluntary conveyance made in good faith transfer his property so as to put it out of the reach of future creditors. When a man transfers a trust fund, of which the income is to be paid to him during his life, and the principal at his death to be paid or transferred to others, the principal may be beyond the reach of his future creditors."

There are only two grounds upon which it can be contended with any plausibility that Mrs. Langmaid retained any interest in the corpus of the estate which can be reached by her creditors, and these are the power of disposal of the estate by will and the possibility that the trustees may pay over to her the proceeds of any real estate which they may sell. We will consider these in their order.

It is undoubtedly true that, if a person has a life estate with a general power of appointment by will, and exercises the power, the property appointed is deemed in equity assets of the estate of such person, and subject to the demands of creditors in preference to the claims of his voluntary appointees or legatees. *Clapp* v. *Ingraham*, 126 Mass. 200. *O'Donnell* v. *Barbey*, 129 Mass. 453. *Olney* v. *Balch*, 154 Mass. 318, 322.

It is equally true that, where an estate is given over in default of appointment, the nature of the estate of the remaindermen is not affected by the power of disposition until that power is exercised. *Moore* v. *Weaver*, 16 Gray, 305. *Johnson* v. *Whiton*, 118 Mass. 340, 344. *Whipple* v. *Fairchild*, 139 Mass. 262. It follows that the mere right to exercise a power cannot be reached by creditors.

The power of disposition of the real estate is vested in the trustees. If they sell or mortgage any part of it, the deeds provide that the proceeds of any sale or mortgage may be retained by them as part of the principal of the trust estate, or may be paid over in whole or in part to Mrs. Langmaid. This certainly gives her no vested interest in the principal of the estate. *Palmer* v. *Stevens*, 15 Gray, 343, 345. The contingency

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may never happen. If it happen, the whole matter is in the discretion of the trustees and cannot be reached by creditors. *Russell* v. *Grinnell*, 105 Mass. 425. *Hall* v. *Williams*, 120 Mass. 344, 346. *Minot* v. *Tappan*, 127 Mass. 338, 336. *Foster* v. *Foster*, 133 Mass. 179. *Wemyss* v. *White*, 159 Mass. 484, 486.

The question whether Mrs. Langmaid has any interest in the income of the estate which has not been disposed of by her, which can be reached by the plaintiff's bill, has not been argued, and we do not decide it. This can be heard and determined by the Superior Court. The decree entered for the plaintiff, on the ground that the corpus of the estate could be reached, must be *Reversed.*

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ELLEN FLYNN *vs.* DAVID FLYNN & another.

Suffolk. December 8, 9, 1897. — May 21, 1898.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Eminent Domain — Inchoate Right of Dower — Trust.

When land is taken by the right of eminent domain, the wife of the person whose land is so taken is not entitled, by reason of her inchoate right of dower, to have a portion of the proceeds set apart by a court of equity for her benefit in case she survives her husband.

BILL IN EQUITY, praying that, by reason of her inchoate right of dower, a portion of the proceeds received from land taken by the right of eminent domain be set apart for the plaintiff's benefit in case she should survive her husband. David Flynn, the husband, and William J. Flynn, the other defendant, to whom it was alleged David had assigned his claim for damages by reason of the taking, demurred to the bill for want of equity. Hearing before *Lathrop*, J., who reserved the bill and the demurrers for the consideration of the full court. If the demurrers were sustained, the bill was to be dismissed, with costs; otherwise, the defendants were to have leave to answer. The facts appear in the opinion.

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W. B. F. Whall, for the defendants.

W. A. Buie, (*J. E. Crowley* with him,) for the plaintiff.

LATHROP, J. The land in which the plaintiff had an inchoate right of dower was taken by the city of Boston by right of eminent domain, for the purposes of a schoolhouse, the city acting by virtue of and in accordance with the provisions of the St. of 1895, c. 408. This act, in § 2, gives the board of street commissioners of Boston, at the request of the school committee, power to "take by purchase or otherwise such lands for school purposes as said school committee, with the approval of the mayor, shall designate, and to take any lands under the right of eminent domain." The board is also required to "sign, and cause to be recorded in the registry of deeds for the county of Suffolk, a statement containing a description thereof as certain as is required in a common conveyance of land and stating that the same are taken for school purposes; and upon the recording of any such statement the lands described therein shall be taken in fee for said city." We assume that all the formalities required have been complied with, and that the city now owns the land in fee.

The question then is whether an inchoate right of dower is such an interest in land that, when the land is taken by the right of eminent domain, the wife may apply to a court of equity to have in some way the benefit of such interest. We are not aware that this right has ever before been asserted in this Commonwealth, and this is the first time that the question has been presented for our decision.

It is declared by the Pub. Sts. c. 124, § 3, as follows: "A wife shall be entitled to her dower at common law in the lands of her deceased husband." This chapter makes many provisions in regard to dower, but there is none which relates to the question before us.

At common law, "a woman is entitled to dower out of all the lands whereof her husband was seised in fee simple, at any time during the coverture." 1 Greenl. Cruise, 175.

There is no doubt that the inchoate right of dower is an encumbrance upon land. *Shearer* v. *Ranger*, 22 Pick. 447. The release of such a right of dower is a good consideration for a promise. *Bullard* v. *Briggs*, 7 Pick. 533. *Holmes* v. *Winches-*

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ter, 133 Mass. 140. *Nichols* v. *Nichols*, 136 Mass. 256. It is a contingent right, which the wife during coverture may have the assistance of the court to establish or protect. *Burns* v. *Lynde*, 6 Allen, 305. *Davis* v. *Wetherell*, 13 Allen, 60. *Madigan* v. *Walsh*, 22 Wis. 501. *Clifford* v. *Kampfe*, 147 N. Y. 383. *Buzick* v. *Buzick*, 44 Iowa, 259. So, too, a wife having an inchoate right of dower may maintain a bill in equity to redeem land from a mortgage in which she has joined with her husband to release dower. *Davis* v. *Wetherell*, 13 Allen, 60. *Lamb* v. *Montague*, 112 Mass. 352. See Pub. Sts. c. 124, § 5. But if the mortgage contains a power of sale, and the wife has joined in the deed with her husband in release of her dower, a sale of the land in pursuance of the power bars all claim and possibility of dower. Pub. Sts. c. 181, § 19.

While a wife may, under Pub. Sts. c. 124, § 6, bar her right of dower by releasing the same in a deed executed by her husband, or by a subsequent deed executed either separately or jointly with her husband, yet she cannot convey her inchoate right of dower to a person to whom her husband has not conveyed the land. Such a deed is void. *Mason* v. *Mason*, 140 Mass. 63. See also *Reiff* v. *Horst*, 55 Md. 42. In *Mason* v. *Mason*, it was said by Mr. Justice Devens: "While the inchoate right of dower is a vested right of value, dependent on the contingency of survivorship, it is not that separate property which passes by conveyance, but a right which one entitled thereto may, under certain circumstances, release. It is of a peculiar character, and, before assignment, the wife has no seisin." While the word "vested" is used in this case, it would seem that the word "contingent," which was used by Chief Justice Parker in *Bullard* v. *Briggs*, 7 Pick. 533, 539, would more accurately describe the nature of the estate. After an assignment of dower is made, the widow acquires no new freehold, her seisin being deemed in contemplation of law a continuation of her husband's seisin. *Windham* v. *Portland*, 4 Mass. 384, 388.

Even after the death of the husband, a creditor cannot at law attach the right of the widow to have her dower assigned to her, or take the same on execution. *McMahon* v. *Gray*, 150 Mass. 289. Until dower has been assigned to her, a widow has no estate in the land of her deceased husband. *Smith* v. *Shaw*, 150

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Mass. 297. *State* v. *Wincroft*, 76 N. C. 38. Nor can she object to a partition of the land among the tenants in common. *Motley* v. *Blake*, 12 Mass. 280. *Ward* v. *Gardner*, 112 Mass. 42.

There can be no doubt that the inchoate right of the wife is always subject to any encumbrance or infirmity in the husband's title existing at the time he became seised; and we are also of opinion that it is subject to any incident attached to it by law. The land may be sold on a petition for partition, if the husband is a tenant in common. Pub. Sts. c. 178, § 65. When this happens, it has been held in a well considered case in Indiana that the wife is not a necessary party to the partition proceedings, and is not entitled to share in the fund derived from the sale. *Haggerty* v. *Wagner*, 148 Ind. 625.

Land may be sold for taxes, and if there is a surplus it is to be paid "to the owner of the estate." Pub. Sts. c. 12, § 35. St. 1888, c. 390, § 40. In a case arising under a New York statute, which directed that any surplus arising on a tax sale "shall be held for the use of and paid over to the person legally entitled upon his establishing his right thereto," it was held that the owner of the land was entitled to the surplus. *People* v. *Palmer*, 10 App. Div. (N. Y.) 395. It was also held in this case that the interest which the wife of the owner had in the land by virtue of her inchoate right of dower, although a valuable interest, was not an "estate" in the land which would give her a right to redeem from the tax sale, under a statute giving a right to redeem to "any person or persons having an estate in, or any mortgagee of" any land sold for taxes.

It is also an incident of land that it is liable to be taken by the right of eminent domain, and we are of opinion that when it is so taken in the lifetime of the husband, the wife is not entitled, on account of her inchoate right of dower, to have any portion of the money received for the land either paid to her directly, or set aside for her benefit on the contingency of her surviving her husband. If the land had not been taken, the husband could have done what he pleased with it during his life. He might have sold it for its full value, yet the wife could not interfere, or deprive him of the use of any part of the purchase money. In case the husband survived the wife, the purchaser would have a good title, which the heirs of the wife could not interfere with.

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If the chief value of the estate should consist of a building on the land, which was insured by the husband, and the building should be destroyed by fire, no one would contend that the wife had any interest in the insurance money, or that a court of equity would compel a part of the money to be set aside for her benefit unless the husband would agree to rebuild the house. Again, if a parcel of land should be washed away by the negligent maintaining of a dam, and the owner of the land should recover as damages the full value of the land, would not the money so received be his to do with as he pleased?

The only case in support of the doctrine contended for by the petitioner which has been decided by a court of last resort is that of *Wheeler* v. *Kirtland*, 12 C. E. Green, 534, decided in 1875 by the Court of Errors and Appeals in New Jersey. It laid down a new doctrine, which has not since been recognized except by a court of inferior jurisdiction, and which we are of opinion is opposed to sound principles.

The case of *Wheeler* v. *Kirtland* was partly decided on the ground that the rule laid down in *Moore* v. *New York*, 4 Seld. 110, had been repudiated or modified in later decisions in that State, citing *In re Central Park Extension*, 16 Abb. Pr. 56, 68, and *Simar* v. *Canaday*, 53 N. Y. 298. In *Moore* v. *New York*, 4 Seld. 110, lands in which the wife had an inchoate right of dower were taken by the right of eminent domain. After the husband's death, his wife claimed dower in them. The statute under which the land was taken authorized commissioners to make "a just estimate of the damage to the respective owners, lessees, parties, and persons respectively entitled unto or interested in the lands." It was said by Gardiner, J.: "The question is whether the possibility of dower accruing to the wife after marriage, but before the death of the husband, is an interest in law, within the purview of this statute. . . . Such a possibility may be released, but it is not, it is believed, the subject of grant or assignment, nor is it in any sense an interest in real estate."

It was held in *In re Central Park Extension*, 16 Abb. Pr. 56, 69, on the authority of *Moore* v. *New York*, that the inchoate right of dower was not an interest in real estate. Judge Ingraham, however, added, after quoting the remarks of Gardiner, J.:

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"It might have been added to that case, that the right was transferred from the land to the money received for the land by the husband, if the wife survived him."

The case of *Simar* v. *Canaday*, 53 N. Y. 298, merely decides that, if a husband is induced to part with his land by fraud, his wife has such an interest that she can join with him in an action against the fraudulent purchaser.

The rule laid down in *Moore* v. *New York*, so far from being repudiated or modified in that State by later decisions, has been recognized and affirmed by the Court of Appeals, *Witthaus* v. *Schack*, 105 N. Y. 332, where it is said by Ruger, C. J.: "The settled theory of the law as to the nature of an inchoate right of dower is that it is not an estate or interest in land at all, but is a contingent claim arising not out of contract, but as an institution of law, constituting a mere chose in action incapable of transfer by grant or conveyance, but susceptible only during its inchoate state of extinguishment. By force of the statute this is effected by the act of the wife in joining with her husband in the execution of a deed of the land. Such deed, so far as the wife is concerned, operates as a release or satisfaction of the interest and not as a conveyance, and removes an encumbrance instead of transferring an interest." See also *Hammond* v. *Pennock*, 61 N. Y. 145, 158.

The only case which has been brought to our attention that has followed *Wheeler* v. *Kirtland* is *In re New York & Brooklyn Bridge*, 75 Hun, 558, and 89 Hun, 219. But the view taken of the nature of the inchoate right of dower in this case does not seem to be in conformity with the cases above cited from the higher courts of New York.

In the cases of *Bonner* v. *Peterson*, 44 Ill. 253, and *In re Hall's estate*, L. R. 9 Eq. 179, cited by the plaintiff, the husband had died, and the widow's right of dower was no longer inchoate when the land was taken.

For the reasons before stated, we are of opinion that the bill should be dismissed.

So ordered.

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ALFRED H. JONES & others *vs.* JAMES F. BROWN, administrator, & another.

171 318
186 [1874]

171 318
187 [2578]

Suffolk. December 10, 13, 1897. — May 21, 1898.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Corporation — Construction of Agreement — Specific Performance — Arbitration — Waiver.

In 1888, the members of a private trading corporation, of whom one was B., who owned four tenths of the stock, executed an agreement, article three of which contained the following: "In the event of B.'s death the remaining stockholders, parties to this agreement, shall have the right to purchase from his estate one half of his stock, within one year from date of his death, and the remaining within two years from said date, at a price equivalent to par and proportion of surplus as set forth in the first article of this agreement." By article five B. agreed that, if the other parties requested, he would at the expiration of one year from the receipt of a notice sell to them one third of his "entire holdings of stock" at a price equivalent to par, together with its proportion of surplus, and thereafter upon a similar notice, at the expiration of one year, would sell a further third at a price calculated in a similar manner. Such notice was given in 1890 by the other parties to B., who, at the end of the year, transferred one third of his stock to them. A similar notice was given in 1891, but B. procured from one of the parties a waiver of his right to take any of B.'s stock during 1892, and the project of taking stock for that year was given up. Late in 1891, B. gave a notice to the other parties, requiring them to take all of his stock under article six, which provided that, if he should desire to dispose of his stock, he should first offer it to the other parties at a price equivalent to par and proportion of surplus; and that, if they should neglect or decline for a period of six months after such notice to purchase the shares, B. might sell them to any other persons, or at his option might call upon the other parties to join with him in winding up the corporation. They did not take the stock within six months; and B., who remained a stockholder, died in 1894. *Held*, upon a bill in equity by the other parties against the administrator of B.'s estate, that they were entitled to specific performance of article three; and that the contract applied also to shares obtained by B. after the capital stock was increased subsequently to the agreement.

The members of a private trading corporation, of whom one was B., executed an agreement, which provided that "in the event of B.'s death the remaining stockholders, parties to this agreement, shall have the right to purchase from his estate one half of his stock, within one year from date of his death, and the remaining within two years from said date, at a price equivalent to par and proportion of surplus as set forth in" the agreement. The agreement also provided for a submission to arbitration if any controversy or difference of opinion should arise between the parties or their representatives; and that "neither side shall be entitled to maintain an action at law or suit in equity until the matter in dispute shall have been first referred to and decided by arbitrators." Within a year after B.'s death the other parties notified the administrator of

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his estate of their election to take all the stock, and made a tender, which was refused. The letter containing the tender stated that, "if you differ with us as to whether the amount tendered is in accordance with the contract, you have only to say so; and we stand ready to submit that difference of opinion to arbitration, under the terms of" the agreement. Three months later, they wrote to him, calling his attention to the fact that they had previously expressed their willingness to submit to arbitration; but he made no answer to this. *Held*, that he had waived the right to have the question submitted to arbitration.

BILL IN EQUITY, filed April 2, 1896, against James F. Brown, administrator of the estate of James W. Brown, and the Walker Stetson Sawyer Company, a corporation, to compel the specific performance of a written agreement. Hearing before *Morton*, J., who ordered a decree for the plaintiffs; and the defendant Brown appealed to the full court. The facts appear in the opinion.

M. Storey, (*C. H. Sprague* with him), for the defendant Brown.

G. A. O. Ernst, for the plaintiffs.

LATHROP, J. The plaintiffs and James W. Brown, the first named defendant's intestate, were members of a private trading corporation, which received its certificate of incorporation on December 20, 1888. It had a capital stock of one hundred thousand dollars, divided into one thousand shares of the par value of one hundred dollars each. Of this stock Brown owned four hundred shares, two of the plaintiffs owned one hundred and fifty shares each, and the other three plaintiffs owned one hundred shares each. On December 31, 1888, the parties entered into an agreement, reciting their ownership of the shares as above stated, and that the parties were desirous "as far as possible of retaining the ownership of said stocks in the hands of those only who may from time to time be actively engaged in the affairs of said company." The agreement contains many articles, among which is the following: "Third. In the event of Mr. Brown's death the remaining stockholders, parties to this agreement, shall have the right to purchase from his estate one half of his stock within one year from date of his death, and the remaining within two years from said date, at a price equivalent to par and proportion of surplus as set forth in the first article of this agreement. Should the remaining parties hereto neglect or decline within the respective periods aforesaid, as set forth in the second and third paragraphs of this agreement, to

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purchase said shares, then the representatives of the deceased may thereafter sell the same to any other person or persons, or, at their option, may at any time call upon the parties hereto to join with them in winding up, liquidating, and obtaining a dissolution of said corporation, which the parties hereto bind themselves to do, within six months after written notice to that effect." It is this article of the agreement which the plaintiffs seek to have specifically enforced.

The first article of the agreement is as follows: "Should for any reason the said corporation at any time, by vote of its directors or otherwise, permanently dispense with the services of either of the parties hereto, the person whose services are thus dispensed with hereby binds himself to sell, and the remaining parties hereby agree to buy, within six months from the date of the vote of dismissal, the shares then owned by the retiring parties at a price equivalent to the par value thereof, together with a fair valuation of the proportionate part of any surplus of earnings that may then be in the treasury, and to which said shares might equitably be entitled at the time of the payment for and the transfer of said shares."

The second article of the agreement is as follows: "In the event of the death of either of the parties hereto (other than Mr. Brown) the remaining stockholders, parties to this agreement, shall have the right, at any time within six months from the date of such death, to purchase the stock of the deceased at a price equivalent to the par value thereof, together with his proportion of surplus as set forth in the first article of this agreement."

The principal objection raised to the recovery by the plaintiffs is that on the facts existing at the time when Brown died, on December 6, 1894, the plaintiffs had no right to the transfer of any shares of stock from his estate.

By the fifth article of the agreement, Brown agreed that, if the other parties requested, he would at the expiration of one year from the receipt of a notice sell to them one third of his entire holdings of stock at a price equivalent to par, together with its proportion of surplus, and thereafter, upon a similar notice, at the expiration of one year would sell a further third, at a price calculated in a similar manner. The plaintiffs gave

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Brown notice, on January 1, 1890, of their desire to buy one third of his stock in one year from that date. In January, 1891, the evidence shows that two of the plaintiffs, one of them having an assignment from the remaining three, this assignment being written by Brown, received what they supposed to be one third of Brown's holdings, namely, one hundred and twenty shares.

On January 1, 1891, the plaintiffs gave Brown notice of their desire to buy an additional one third of his stock. Brown thereupon procured from one of the plaintiffs a waiver of his right to take any of Brown's stock during the year 1892, and the project of taking stock for that year was given up.

We fail to see that there was any breach of the contract on the part of the plaintiffs. They had an option to take certain shares of stock, which, in 1891, was substantially complied with, and Brown made no objection that it was not fully complied with. The second call for shares of stock, there was evidence tending to show, would have been met by the plaintiffs but for the procuring by Brown of the waiver to take stock by one of the plaintiffs.

On October 23, 1891, Brown gave a notice to the plaintiffs, requiring them to take all of his stock under article six of the agreement. This article provides in substance that, if he should desire to dispose of his stock, he should first offer it to the plaintiffs at a price equivalent to par and proportion of surplus as set forth in the first article of the agreement, the same to be paid for with joint notes, bearing interest, for certain specified amounts. The article concludes thus: "Should the remaining stockholders neglect or decline for a period of six months after such notice to purchase said shares on the terms aforesaid, then said Brown may sell the same to any other party or parties, or at his option may call upon the remaining parties hereto to join with him in winding up, liquidating, and obtaining a dissolution of said corporation, which the parties hereto bind themselves to do, within six months after written notice to that effect."

The plaintiffs did not take the stock within the six months, and hence it is contended that the contract is at an end. But Brown's rights were either to sell to persons not parties to the contract, or to have the corporation wound up. He did neither,

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with the exception of selling a few shares to some of the employees, as did some of the plaintiffs. Article nine of the agreement is thus: "After, and as often as, a party hereto has in accordance with this agreement ceased to be a stockholder in said corporation, his rights herein, as well as his obligations, shall cease." Brown remained a stockholder, and acted as such and as an officer of the corporation down to the time of his death. He recognized the agreement as in force both in January, 1892, and in January, 1893, and the finding of the single justice that he waived or abandoned the notice of October, 1891, is fully warranted.

The next question is whether the contract applies only to the shares owned by Brown when the contract was made, or whether it also applies to the shares obtained by Brown after the capital was increased.

The first increase in stock was made in January, 1891, of fifty per cent, and the second in January, 1893, of thirty-three and a third per cent. Neither was in terms a stock dividend, but there can be no doubt that each was in effect a stock dividend, for the dividend declared for the year 1890 was forty-eight per cent, and the dividend for the year 1892 was thirty-five per cent. The agreement does not specifically refer to the possibility of new stock, but it does refer to a possible surplus of earnings, and the rights of the parties to this surplus are recognized. Thus in article one, if the services of any of the parties were dispensed with, he was to sell, and the other parties to buy, the shares "then owned" by him at a price equivalent to the par value thereof, together with a fair valuation of the proportionate part of any surplus of earnings that may then be in the treasury, and to which said shares might equitably be entitled at the time of the payment for and transfer of said shares.

While the word "then" does not appear in the other articles, the subject matter of the agreement is generically the same in all the articles. The phrase "the stock of the deceased," in the second article, naturally means all the stock of the deceased. By the fifth article, Brown agrees to sell "one third of his entire holdings of stock." We see no reason to doubt that the words used in the third clause mean the same as those of the other clauses.

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The underlying idea of the agreement is that there was to be a close corporation, and that the ownership of the shares was to be, as far as possible, in the hands of those who might from time to time be actively engaged in the business of the company. As the right to a proportionate part of the surplus was given, by the terms of the contract, to the right to take the stock in the various contingencies provided for, it follows that if this surplus is distributed in stock, or in money which is paid for new stock, such stock must be within the terms of the contract. See *Atkins* v. *Albree*, 12 Allen, 359; *Billings* v. *Billings*, 110 Mass. 225, 228.

The remaining question relates to the eleventh article of the agreement. This provides for a submission to arbitration if any controversy or difference of opinion should arise between the parties, or any of them, or their respective representatives. It concludes as follows: "Neither side shall be entitled to maintain an action at law or suit in equity until the matter in dispute shall have been first referred to and decided by arbitrators as aforesaid, and then only upon such award as said arbitrators shall make, and the obtaining and decision of such arbitrators on the matter in dispute is hereby declared to be a condition precedent to the right of any party to maintain any such action or suit."

Some efforts appear to have been made by the plaintiffs soon after Brown's death to procure the transfer of the shares of stock in controversy by an amicable adjustment. The administrator of Brown's estate stated in writing, on May 20, 1895, and on November 27, 1895, that the plaintiffs' rights lapsed by reason of their non-compliance with the notice of October 23, 1891. On October 21, 1895, the plaintiffs notified the administrator of their election to take all the stock, and on December 5, 1895, they made a tender in writing, which was refused. On December 20, 1895, the plaintiffs again wrote to the defendants a letter referring to the tender, and adding: "If you differ with us as to whether the amount tendered is in accordance with the contract, you have only to say so; and we stand ready to submit that 'difference of opinion' to arbitration, under the terms of clause 11 of the contract of December 31, 1888." So, too, on March 5, 1896, the plaintiffs wrote to the administrator, call-

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ing his attention to the fact that they had previously expressed their willingness to submit to arbitration. This letter was delivered personally to the defendant Brown, but no answer was received.

We are of opinion that the question arising on the arbitration clause is disposed of by the cases of *Miles* v. *Schmidt*, 168 Mass. 339, and *Hutchinson* v. *Liverpool & London & Globe Ins. Co.* 153 Mass. 143, 147. The first case decides that an article in an agreement to submit to arbitrators the question whether the agreement has been violated is void. The second case decides that an agreement to submit the amount of damages to arbitration may be waived. The plaintiffs were not bound to submit the question as to what was the construction of the contract to arbitration, nor whether there had been a breach thereof. They offered to submit to arbitration the only question proper for arbitration, and on the evidence it is competent for us to find that the defendant Brown waived the right to have this question submitted to arbitration.

If the plaintiffs are entitled to recover, it is not disputed that the remedy sought in this suit is the proper one, as the stock is not bought or sold in the market. *New England Trust Co.* v. *Abbott*, 162 Mass. 148. *Decree affirmed.*

HENRY W. BRAGG, trustee, *vs.* LOUISA M. CARTER & others.

Suffolk. December 14, 15, 1897. — May 21, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Will — Trust — Income — Children, Grandchildren, and Great-grandchildren — Issue — Allowance for Counsel Fees — Decree.

Where, after giving the children of the testator a life interest, a will provides that "on the decease of either of the above named children, leaving a child or children, the proportion of such deceased child's income shall be given to said child or children," A., the survivor of A. and B., two children of a child of the testator, is entitled to the entire income to which the parent would be entitled if living, and B.'s children, who are great-grandchildren of the testator, have no

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interest therein, especially if that conclusion is favored by the other portions of the will.

So much of a decree, in the case of a bill in equity asking instructions as to the construction of a will as relates to an allowance to counsel for fees and expenses, is to be settled by a single justice, it not appearing that the allowance made includes the services of counsel on the appeal.

BILL IN EQUITY, filed November 4, 1896, by the trustee under the will of Samuel Cutter, to obtain the instructions of the court as to the construction of the will. The following are the material portions of the will:

"After the payment of my just debts and funeral expenses and expenses of administration, I give and bequeath to my wife, Charlotte Cutter, all the household furniture which may be in my dwelling-house at the time of my decease, and my wearing apparel.

"I also give, bequeath, and devise to my said wife Charlotte the use and improvement of all my estate, real and personal, during her life.

"Item. At the decease of my said wife, I give, bequeath, and devise the use and improvement of all my estate, real and personal, to my children, viz. Charlotte P. Hall, wife of Osborn B. Hall, Samuel W. Cutter, Louisa M. Carter, wife of John H. Carter, Sarah Ann Hunnewell, wife of Edwin Hunnewell, Benjamin L. Cutter, Theodore A. Cutter, Henry E. Cutter, and William S. Cutter; and on the decease of either of the above named children leaving a child or children, the proportion of such deceased child's income shall be given to said child or children, and on the decease of either of the above named children leaving a widow but no child, the proportion of such deceased child's income shall be given to said widow while she remains the widow of such deceased child, and on the decease of either of the above named children leaving no lawful issue or widow, the proportion of such deceased child's income shall be given to the surviving brothers and sisters in equal proportions, and on the decease of all the above named children I give, bequeath, and devise all my estate, real and personal, to my grandchildren who may be then living, to be equally divided between them:

"Provided, however, that the proportion to be paid to any widow of a deceased son shall continue to be paid from the

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income of the whole estate, each share contributing its equal part so long as she or they remain such widow."

The testator appointed an executor "to carry out the provisions of this will," giving him power to sell any portion of the real estate: "such sale of real estate is to be deemed by my said executor to be for the benefit of my family, and consent to such sale must be first given in writing by my said wife if living and by a majority of my before named children who may be living at the time of such sale." The executor is further directed to "invest the proceeds of such sale in some safe manner, or in other real estate for the benefit of my family."

The bill alleged that the testator died in 1864, leaving a widow, since deceased, and as his only heirs and next of kin Charlotte P. Hall, who has since died leaving no issue, Samuel W. Cutter, now deceased, Louisa M. Carter, Sarah Ann Hunnewell, who has since died leaving as her only issue a daughter, Charlotte Wellington, Benjamin L. Cutter, who has since died leaving no issue, Theodore A. Cutter, Henry E. Cutter, and William S. Cutter; that Samuel W. Cutter had died leaving a son, Samuel Cutter, and a daughter, now Mary E. McMahon; that the last named Samuel Cutter, being a grandson of the testator, had died leaving a widow, Maud Estelle Cutter, and three minor children, viz. the said Frank Revenue Cutter, Mary Cutter, and Samuel Wheelock Cutter, said last named minor children being great-grandchildren of the testator; that it was contended in behalf of the last named great-grandchildren that they were entitled to receive the share of the income of the trust estate to which their father, Samuel Cutter, would be entitled if living; that it was also contended that such share should be paid to the children of the testator now living; and that there was a possibility that said share should be paid to Mary E. McMahon, and that Maud Estelle Cutter might make some claim thereto.

A decree was entered by a single justice "that the respondent Mary E. McMahon is entitled to receive the whole of that share in the income of the trust estate to which her father, Samuel W. Cutter, would be entitled were he living, such share being now one sixth of the entire income of the trust estate; that it is

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the duty of the trustee to pay over to said Mary E. McMahon one sixth part of the annual income of the trust estate; that Samuel W. Cutter, May Cutter, and Frank R. Cutter, minor children of Samuel Cutter, deceased, are not entitled to receive any part of the income of the trust estate"; and "that the sum of fifty dollars be allowed to counsel for Mary E. McMahon, and the sum of fifty dollars to counsel for Arthur H. Brooks, guardian *ad litem* for Samuel W. Cutter, May Cutter, and Frank R. Cutter, minor children, as counsel fees and expenses, said sums to be paid to them by the petitioner out of the funds of the estate in his hands."

The minor respondents, Frank Revenue Cutter, May Cutter, and Samuel Wheelock Cutter, by their guardian *ad litem*, Arthur H. Brooks, appealed to the full court.

R. Bradford, for the plaintiff, read the papers in the case.

A. H. Brooks, guardian *ad litem*, for the minor children of Samuel Cutter.

T. Hunt, for Mary E. McMahon.

LATHROP, J. The general scheme of the testator is this. He gives to his wife the furniture which is in his dwelling-house, and also gives to her the use and improvement of all his real estate and personal property during her life. At the decease of his wife, he gives a life estate to his children, naming them, and makes a provision for the case of a child dying leaving a child or children, and for the case of a child leaving a widow. On the death of all the children mentioned, he gives all of his estate, real and personal, to his grandchildren who may then be living, to be equally divided between them. He also appoints an executor and trustee "to carry out the provisions of this will." To the executor is given power to sell any portion of the real estate; "such sale of real estate is to be deemed by my said executor to be for the benefit of my family, and consent to such sale must be first given in writing," by the widow if living, and by a majority of the children living at the time of the sale. The executor is further directed to "invest the proceeds of such sale in some safe manner . . . for the benefit of my family."

The testator died in 1864, leaving a widow and eight children surviving him, three of whom were married. The widow died

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in 1878. Since the testator's death, five of his children have died, two leaving issue, and three leaving no issue. One of the two leaving issue was a son, Samuel W. Cutter, who left a son Samuel and a daughter Mary, now Mrs. McMahon. Samuel, the grandson of the testator, is now dead, leaving a widow and three minor children. His sister also survived him. The question before the court is whether the income of his father's share should be paid to his sister or to his three minor children, who were the great-grandchildren of the testator.

The language of the will seems to us reasonably plain. After the provision giving the children of the testator a life interest, it is provided, leaving out the provision for a widow of a child: "and on the decease of either of the above named children leaving a child or children, the proportion of such deceased child's income shall be given to said child or children." Mrs. McMahon is now the only surviving child of Samuel W. Cutter, and is therefore entitled to the income.

One ground upon which the great-grandchildren of the testator contend that they are entitled to the income is, that the will provides for the case of the death of any one of the testator's children "leaving no lawful issue or widow," in which event "the proportion of such deceased child's income shall be given to the surviving brothers and sisters in equal proportions." The word "issue" may, undoubtedly, not be restricted to children, (*Hills* v. *Barnard*, 152 Mass. 67, 73,) but we have no occasion in this case to consider whether the testator in that particular clause intended children or a more remote descendant, for Mrs. McMahon does not claim under this clause.

It is further contended that, as the word "children" may be interpreted to mean grandchildren, (*Bowker* v. *Bowker*, 148 Mass. 198,) so the word "grandchildren" may be interpreted to mean great-grandchildren, and that when the fund comes to be divided, if there are no grandchildren then living, the great-grandchildren may take under the will. But whatever construction may be given if there are no grandchildren when the last child of the testator dies, it is manifest that the testator did not intend to go beyond grandchildren, if there were any of this class living when the principal came to be disposed of. The estate is then to be divided, not *per stirpes* but *per capita*.

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The language is "to my grandchildren who may be then living, to be equally divided between them."

We are therefore of opinion that the decree of the single justice, so far as it relates to the questions argued before us, should be affirmed. So much of the decree as relates to an allowance to counsel for fees and expenses is to be settled by a single justice, as we do not understand that the allowance made includes the services of counsel on the appeal.

Decree accordingly.

WILLIAM A. TURNER *vs.* REVERE WATER COMPANY.

Suffolk. January 26, 27, 1898. — May 21, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

171 329
173 566
171 329
187 556

Water Company — Refusal of Water Supply for Non-payment of Charges — Unreasonable and Void Regulation.

A water company incorporated for the purpose of supplying the inhabitants of a town with water, which is authorized "to distribute water through said town and establish and collect rates therefor," has no right to refuse to supply water to the lessee of a house connected with its system on the ground that the owner of the house has not paid the rates for the previous year; and a regulation of the company that "in all cases of non-payment of rates fifteen days after same are due, the water may be shut off without further notice, and not be again turned on until rates are paid," so far as it may be construed as giving such a right, is unreasonable and void.

BILL IN EQUITY, filed February 5, 1897, to compel the defendant to supply the plaintiff with water, and to restrain it from preventing him from securing a suitable supply thereof.

At the hearing in the Superior Court, on an agreed statement of facts, a decree was entered restraining the defendant from refusing or neglecting to supply the plaintiff with a suitable supply of water so long as he continues to pay the regular water rates, and complies with all other reasonable and usual regulations of the defendant in the future, except those relating to the payment of the water rates remaining unpaid of previous owners

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or tenants, and the defendant appealed to this court. The material facts appear in the opinion.

The case was argued at the bar in January, 1898, and afterwards was submitted on briefs to all the justices.

B. N. Johnson, for the defendant.

C. R. Morse, for the plaintiff.

LATHROP, J. On February, 1, 1897, the plaintiff hired a dwelling-house in Winthrop, from Clarissa C. Doane, its owner. Two days later, he applied to the defendant to have water turned on, and tendered the price charged from January 1, 1897, to January 1, 1898. The defendant refused to turn on the water, until the amount due to it for water supplied to Mrs. Doane from January 1, 1896, to October 10, 1896, had been paid. In October, 1893, one Emmet Doane, then owner of the house, made an application for water for the house, and paid the bills sent to him on July 1, 1894, and on July 1, 1895. On July 13, 1895, Emmet J. Doane conveyed the house to his mother, Clarissa C. Doane, who since that date has been the owner. The defendant received no notice of this conveyance until June 8, 1896. On July 1, 1896, the defendant sent a bill to Mrs. Doane for water during the year 1896. This bill was not paid, and on July 17, 1896, the defendant sent notice to Mrs. Doane that the water would be cut off unless the bill sent on July 1 should be paid immediately. On October 10, 1896, the water was shut off. The defendant refuses to turn on the water until the plaintiff pays the bills incurred by his landlord, because it has the following rule or regulation:

"The rates for use of water shall be payable on the first day of July in each year. All charges for specific supplies, or for fractional parts of the year, shall be payable in advance before the water is let on. In all cases of non-payment of rates fifteen days after same are due, the water may be shut off without further notice, and not be again turned on until rates are paid, and $1.50 additional for shutting off and letting on."

The Superior Court entered a decree restraining the defendant from refusing or neglecting to provide the plaintiff with a suitable supply of water, so long as he continues to pay the regular water rates, and complies with all other reasonable and usual regulations of the defendant in the future, except those

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relating to the payment of the water rates remaining unpaid of previous owners or tenants.

The case is before us on appeal; and the principal question presented is whether, if the rule applies to a case like this, it is reasonable.

The defendant was incorporated under the St. of 1882, c. 142, "for the purpose of furnishing the inhabitants of Revere with water for domestic and other purposes." By § 4, it was given the power to "establish and fix from time to time rates for the use of such water, and collect the same."

By the St. of 1884, c. 259, it was authorized to contract with the town of Winthrop to supply that town with water "for the extinguishment of fires and for other purposes, as authorized by said act." It was also authorized to "distribute water through said town, and establish and collect rates therefor in like manner as by said act it is authorized to do in the town of Revere." The amendment of its charter by the St. of 1887, c. 387, is immaterial to the case.

It is contended that the rule is a reasonable one, because similar rules have been established by ordinances in various cities, and in a statute of Georgia granting a charter to the city of Atlanta; and that it has been decided to be reasonable in Pennsylvania. It is also argued that it is easy for a person hiring or buying a house to ascertain whether the debt of some former owner has been paid.

Of course, it cannot be disputed that, if the Legislature gives a lien upon the land to a water or gas company for unpaid dues, or uses words equivalent to giving a lien, it has the right to do so, and there is nothing more to be said.

In *Atlanta* v. *Burton*, 90 Ga. 486, the charter provided that the board of water commissioners shall have the power to "require the payment in advance for the use or rent of water furnished by them in or upon any building, place, or premises, and in case prompt payments shall not be made, they may shut off the water from such building, place, or premises, and shall not be compelled again to supply said building, place, or premises with water until said arrears, with interest thereon, shall be fully paid." It was held that the commissioners might furnish water on credit; that the charter did not contemplate a

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personal credit, because water was not furnished to persons but to buildings. "The charter did not contemplate nor intend that water should be furnished upon individual or personal credit, but that the supply should be made a charge upon the property to which the water was conveyed."

In *Girard Ins. Co.* v. *Philadelphia*, 88 Penn. St. 393, the words of the ordinance were that, after the water was turned off, it "shall not again be supplied or furnished to the said premises except upon payment of all arrears of water rent, and the sum of two dollars for expenses incurred." The opinion of the court states that the validity of the ordinance was conceded. The only question was whether, as the defendant had not sooner cut off the water on rates not being paid, the plaintiff was obliged to pay three years' rates due from a former owner, instead of the rates for one year, of which it had made a tender.

The case of *Commonwealth* v. *Philadelphia*, 132 Penn. St. 288, a gas case, simply considered the question as settled by the former case, and the opinion does not discuss it.

In *Appeal of Brumm*, 12 Atl. Rep. 855, a water case, the charter expressly provided that the real estate to which the water was furnished should be bound by the water rates.

The argument derived from foreign legislation and ordinances of cities in other States seems to us to be of little consequence in determining the question before us as to the effect of the regulation in this case. It may be noted, however, that in New York it is expressly provided that a gas company cannot refuse to turn on gas because a former occupant of the premises has not paid for the gas consumed by him. St. 1859 (N. Y.), c. 311, §§ 6, 9. 2 Rev. Sts. (N. Y. 1896), 1356, 1357.

In England it has been held, under the St. 10 & 11 Vict. c. 17, that, if a tenant does not pay water rates, the water company may sever the connection between the house and the main pipes, and that, if a new tenant occupies the house, he has the right to have the water turned on, on reconnecting the pipes; but until he does so, the water company is not liable to a penalty under the act for not supplying him with water. The remarks of Bramwell, L. J., on the point of not compelling the new tenant to pay an old debt, will be cited later. *Sheffield Waterworks Co.* v. *Wilkinson*, 4 C. P. D. 410.

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Under the St. 50 & 51 Vict. c. 21, § 4, arrears of water rates where the rent does not exceed £20 may be recovered in a personal action against a purchaser of land, but the water cannot be cut off. *East London Waterworks Co.* v. *Kellerman*, [1892] 2 Q. B. 72.

So far as legislation is concerned in Massachusetts, the case of a gas company is covered. The Pub. Sts. c. 61, § 16, gives the company the right to "stop the gas from entering the premises" of a person neglecting to pay the amount due; and to enter the premises between certain hours and remove the meter, etc. Nothing is said about making subsequent users liable for old debts.

The St. of 1894, c. 299, makes it unlawful for a gas company to refuse to supply gas for any building or premises "for the reason that a gas bill remains unpaid by any previous occupant of said building or premises: provided the person or persons applying for gas shall not be in arrears to such corporation for gas previously furnished to or for said building or premises, or to or for any other building or premises."

So far as gas is concerned the question is settled.

As to water there was no general legislation until after this action was brought. The St. of 1898, c. 168, makes the same provision as to water that the St. of 1894, c. 299, made as to gas. The statute is not retroactive, and the question before us must be decided on general principles. There is much in our special legislation to show that we should not hold that one man is obliged to pay the debt of another, or that a water rate is a charge upon the land. The charter of the defendant is one of the simpler forms. The one which is generally found, and which applies to most of the cities and towns of this Commonwealth, after giving the right to regulate the price or rents for the use of the water, contains this provision: "The occupant of any tenement shall be liable for the payment of the price or rent for the use of the water in such tenement; and the owner thereof shall be also liable, if, on being notified of such use, he does not object thereto." * This must mean by an action of con-

* St. 1846, c. 167, § 14, Boston; St. 1863, c. 168, § 13, New Bedford; St. 1864, c. 268, § 14, Salem; St. 1865, c. 153, § 9, Cambridge; St. 1867, c. 60, § 7, Medford; St. 1867, c. 343, § 13, Roxbury; St. 1869, c. 462, § 12, Lynn;

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tract, for it is simply a liability for rent; and in some charters the words are added, "to be collected in an action of contract in the name of the town."

Our Legislature has never authorized the making of an unpaid water rate a lien or charge upon the land. It has authorized holding the owner liable, after notice, in some charters, for the debt of a tenant, but in no instance has a tenant been held liable for the debt of an owner. If the authority to create a lien or charge is to be derived from the right to make rules, there would have been no necessity to insert the words above cited.

In the absence of legislation, can a regulation such as the one in question, if it imposes a lien on land, be considered a reasonable one? We are of opinion that this question must be answered in the negative.

In *Lumbard* v. *Stearns*, 4 Cush. 60, it was declared by Chief Justice Shaw that a private water company, by accepting its charter, would abuse its franchise if it failed to furnish water,

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St. 1871, c. 307, § 8, Woburn; St. 1871, c. 133, § 17, Fall River; St. 1872, c. 343, § 14, Brookline; St. 1872, c. 188, § 9, Concord and Lincoln; St. 1872, c. 62, § 9, Holyoke; St. 1872, c. 79, § 11, Lawrence; St. 1872, c. 344, § 14, Newton; St. 1872, c. 345, § 10, Springfield; St. 1872, c. 336, § 14, West Roxbury; St. 1872, c. 337, § 11, Waltham; St. 1873, c. 274, § 7, Lexington; St. 1873, c. 76, § 9, Natick; St. 1873, c. 322, § 9, Westfield; St. 1874, c. 191, § 9, Danvers; St. 1874, c. 256, § 9, Marlborough; St. 1874, c. 125, § 10, Newton; St. 1875, c. 199, § 14, Watertown; St. 1881, c. 206, § 8, Framingham; St. 1884, c. 256, § 12, Cambridge; St. 1887, c. 416, § 11, Malden.

The following charters have the "occupant and owner" clause, but add that the water rates are "to be collected in an action of contract in the name of the city." St. 1891, c. 348, § 9, Haverhill; St. 1891, c. 401, § 13, Quincy; St. 1894, c. 187, § 12, Stoneham; St. 1897, c. 473, § 10, Stoneham.

The following charter provides that the notice of objection *to* the owner must be in writing: St. 1875, c. 217, § 9, Taunton.

The following charters provide that the notice of objection *from* the owner must be in writing: St. 1876, c. 98, § 9, Clinton; St. 1881, c. 174, § 9, Weymouth.

The following charter provides that both the notice to the owner and the objection from the owner must be in writing: St. 1875, c. 158, § 6, Rockport Water Co.

The following charter provides: "The owner of any tenement shall be liable for the payment of the rent for the use of the water in such tenement, to be collected in an action of contract in the name of the city." St. 1892, c. 384, § 12, Chicopee.

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and that it was its duty to supply all who should apply for water on reasonable terms. See also *Young* v. *Boston*, 104 Mass. 95.

The ordinance of the city of Lowell, which was before the court in *Merrimack River Savings Bank* v. *Lowell*, 152 Mass. 556, was much more explicit than the one before us. It provided that, in case the water was cut off for non-payment of rates, it should not be let on "either for the present or any subsequent occupant," except upon payment of the amount due. The point decided was, that, after the city had received the money for a year's use of the water, it could not cut it off during the year because a former occupant had not paid his bill. There is no intimation in the opinion that a water rate constitutes a charge upon land, and the case goes upon the ground of contract. Indeed, it is said by Mr. Justice Knowlton, speaking of payments of rates: "It seems to be more consistent with the nature of the transactions to consider them as payments of the price of a commodity, sold under a general authority to provide for the public, and to sell upon request, in a reasonable way, to the persons who constitute the public."

It may be desirable that a water company or a gas company should have an easy way of collecting its debts, but we see no reason why it should be enabled by the court to collect a debt from one who is not a party to the contract, when it sells its commodity on credit. The Legislature may give such a company a lien, as it has given one to mechanics. We have no doubt that pay may be demanded in advance, as is done in Boston, though whether the owner of the house could not have the water shut off during the year, and recover for what he had not used, may be considered an open question. See *Rockland Water Co.* v. *Adams*, 84 Maine, 472. In this case, the owner of a house had paid bills which contained the words, "one year's rent will be required in all cases." During a subsequent year he used the water for four months only, and was sued for a year's supply. It was held that the regulation was unreasonable and void, and that the plaintiff could not recover unless the defendant expressly assented to the regulation, and that payment of former bills was not such assent. See also *Wood* v. *Auburn*, 87 Maine, 287, where there are some strong remarks in favor of the consumer.

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We have also no doubt that a water company may demand a deposit, as is required by the Boston Gas Light Company, where it does not know the consumer. This was held to be reasonable in the case of a gas company in *Williams* v. *Mutual Gas Co.* 52 Mich. 499. See also *Shepard* v. *Milwaukee Gas Light Co.* 6 Wis. 539, and 15 Wis. 318.

The right to shut off water or gas, if a bill is not paid, is undoubted, so far as the consumer is concerned. *People* v. *Manhattan Gas Light Co.* 45 Barb. 136. *McDaniel* v. *Springfield Waterworks Co.* 48 Mo. App. 273. *Sheward* v. *Citizens' Water Co.* 90 Cal. 635. *Shiras* v. *Ewing*, 48 Kans. 170.

If gas is supplied to the owner of different houses under separate contracts, failure to pay the gas bill on one house does not authorize the cutting off of the gas from the other. *Gas Light Co.* v. *Colliday*, 25 Md. 1. See also *Lloyd* v. *Washington Gas Light Co.* 1 Mackey, 331.

In *American Water Works Co.* v. *State*, 46 Neb. 194, where a consumer of water who was in default, after the water was turned off, tendered his arrears due, but refused to pay one dollar, as required by regulation of the company for turning the water on, the court by mandamus compelled the company to turn the water on, holding the regulation to be unreasonable. See also *Smith* v. *Birmingham Water Works Co.* 104 Ala. 315.

It is difficult to see how a lien or charge upon land can be created, except by the written consent of the owner or by an act of the Legislature, when it is provided by the Pub. Sts. c. 120, § 3, "and no estate or interest in land shall be assigned, granted, or surrendered, unless by such writing [i. e. an instrument in writing signed by the grantor] or by operation of law."

Water is a necessity, and without it a house cannot at the present time be occupied in our cities. It must be obtained from a water company, and to compel a man to pay another's debt in order to obtain it seems to us a result that ought not to be reached. Water is even a greater necessity than gas, for there are other means of lighting in use; yet in the case of gas there is a decision directly in point.

In *New Orleans Gas Light & Banking Co.* v. *Paulding*, 12 Rob. (La.) 378, the plaintiff refused to supply the defendant with gas unless he paid an unpaid bill contracted by a former

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owner of the building. He promised to do so, in order to obtain the gas. The plaintiff turned on the gas, and afterwards sued him on his promise to pay the amount due from the former owner. The court held that the promise was void, and that the plaintiff had no right to require such a payment.

In *Sheffield Waterworks Co.* v. *Wilkinson*, 4 C. P. D. 410, 421, 422, it is said by Bramwell, L. J.: "My judgment does not proceed upon this, that the appellants have a right to insist upon the communication with their main remaining severed, until their claim for rates due from the preceding occupier is satisfied. I do not think they have such right. That was, no doubt, the notion upon which they acted; but in my opinion it is not sustainable. The learned magistrate who has stated this case has argued it extremely well; and I agree with him in thinking that it was not the intention of the legislature that the undertakers should be at liberty to withhold the supply of water from the respondent's premises until the arrears due from some one else are paid. I also agree with him in thinking that ample provision is made for their security by enabling them to demand the rates in advance, without having what may be called something in the nature of a lien upon the property itself for bygone rates."

It is suggested that a lessee or purchaser can easily protect himself, by finding out whether the water has been paid for. The answer to this is obvious. The records of a water company are not public records, to which any one has access. If inquiry be made, there is no law to compel the company to give a certificate in writing. The answer would be a verbal one. If there should be a controversy as to what it was, it would be a matter to be proved. An answer in the negative would only operate by way of estoppel, and this would have to be proved. Suppose it turned out that there was an old bill, which the clerk who gave the answer supposed had been paid, when in fact it had not been, and the company should show that the clerk had no authority to answer the question. Is the man who proposes to buy a house to be kept from completing the purchase until all these matters are determined by a court of law? See *Wood* v. *Auburn*, 87 Maine, 287, 292. It seems to us that, if an unpaid gas or water bill is made a charge upon the

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land without authority of a statute, there are numerous difficulties to be encountered; and that the better rule is that any such regulation as that before us, if construed as the defendant seeks to construe it in this case, is unreasonable and void.

Decree affirmed.

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GEORGE A. DEVLIN *vs.* SAMUEL DALTON & others.

Suffolk. March 3, 4, 1898. — May 21, 1898.

Present: ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Certiorari — Statute — Discharge of Officer of the Volunteer Militia.

Certiorari will not lie to correct the proceedings of the board of examiners acting under § 64 of St. 1893, c. 367, entitled "An Act concerning the volunteer militia."

PETITION, filed May 3, 1897, against Samuel Dalton, Adjutant General in charge of the records, and the board of examiners under § 53 of c. 367 of the Acts of 1893, entitled "An Act concerning the volunteer militia," for a writ of certiorari to quash the proceedings of that board in discharging the petitioner from his position as a captain in Company F of the Sixth Regiment of the Massachusetts Volunteer Militia. Hearing before *Holmes*, J., who ruled that the petitioner was subject to examination, and denied the motion for a further return or answer, and reported the case at the request of the petitioner for the consideration of the full court. The facts appear in the opinion.

F. S. Hesseltine, (*N. F. Hesseltine* with him,) for the petitioner.

J. M. Hallowell, Assistant Attorney General, for the respondents.

ALLEN, J. The Fourth Amendment to the Constitution provides that "All officers commissioned to command in the militia may be removed from office in such manner as the Legislature may, by law, prescribe." The St. of 1893, c. 367, § 42, provides that an officer elect shall "be commissioned and notified to appear before the examining board provided in section fifty-three." Section fifty-three provides that "Every commissioned officer [with cer-

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tain exceptions not now material] shall, upon being notified as provided in section forty-two, appear before an examining board, to consist of the permanent commanders of brigades, regiments of infantry, battalions of artillery and cavalry, the naval brigade and corps of cadets. The board shall examine the said officer as to his military, moral, and general qualifications. . . . If in their opinion such officer is competent, the fact shall be certified to the commander in chief. . . . Any officer who fails to appear before the board of examiners within forty days from the date of his election or appointment, or who fails to pass a satisfactory examination before said board, shall be forthwith discharged by the commander in chief." Section 64 is as follows: "An officer who fails to pass the board of examiners or fails to appear before said board, as provided in section fifty-three of this act, and any officer who may at any time be ordered before said board of examiners, and who fails to pass, shall be discharged by the commander in chief."

The first portion of § 64 is a repetition of the provision last quoted of § 53; but the latter portion provides for a new examination by the same board at any subsequent time when so ordered. This provision had its origin in St. 1884, c. 230, § 9, and it was repeated in St. 1887, c. 411, § 64; and it was no doubt intended to meet cases where experience raised a question as to the qualifications of officers who had passed the examination provided for in § 53, shortly after their election. The scope and purpose of the later examination are the same as in the original one; namely, to ascertain as to the officer's military, moral, and general qualifications, and to determine whether in the opinion of the board of examiners he is competent for his position. The petitioner therefore lawfully might be ordered to appear before the board of examiners for a subsequent examination, although he had passed a satisfactory examination upon his election in 1893.

The petitioner also contends that he was in reality tried before the board of examiners on secret charges which had been filed against him by his colonel, who was a member of the board, and that the board acted virtually as a court, though without having formal charges filed, or allowing him to be represented by counsel; and that, being a court, a writ of certiorari may issue to

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correct its proceedings. But this is a misconception of the position and doings of that board, which was acting in no sense as a court of inquiry, or court martial, or court of any kind, but only as a board of examiners, to ascertain and determine if the petitioner was competent for his position. Following the usual course of proceedings on a petition for a writ of certiorari, that board has made a return of its doings, by which it appeared that the petitioner was examined by and in the presence of the board as to his military, moral, and general qualifications; that he answered some of the questions put to him, and refused to answer others; that he took no specific objection or exception to any of the questions so put to him; that he failed to pass a satisfactory examination before the board; and that the result of the examination was forwarded by the board through the regular military channels to the commander in chief. A record of the result was made, but the board had no other or further records concerning any order of discharge, or relating to the proceedings in the examination, and no record of the questions asked, answered, or declined to be answered in the examination. It thus appears that the petitioner was personally before the board of examiners, who could form some opinion as to his competency to command a company of infantry, from his appearance, manner, mode of speech, and conduct, as well as from a consideration of his answers taken abstractly. It cannot be expected that we should revise their conclusion, or do anything further than to see if it appears that any error in point of law was committed. *People* v. *Hill*, 126 N. Y. 497. *Simon* v. *Hoboken*, 23 Vroom, 367. A writ of certiorari does not lie to revise a decision of a question of fact upon evidence heard. *Farmington River Water Power Co.* v. *County Commissioners*, 112 Mass. 206. And especially a court of law is not a proper tribunal to determine the competency of a military officer. We are unable to see that any error in law was committed by the board of examiners in reaching their conclusion. The fact that it did not act as a court disposes of most of the objections urged against its proceedings. An examining board, with a view to ascertain the petitioner's qualifications, might put questions touching any matter which would aid it in its decision. And we have no occasion to consider whether or not he properly declined to answer any questions so put. The grounds of its decision are not stated.

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None of the minor objections taken by the petitioner can avail him. Since in these proceedings the board of examiners did not act as a court, his petition must fail, because a writ of certiorari is issued only to revise proceedings which are judicial in their nature. *Attorney General* v. *Northampton*, 143 Mass. 589. And in any case it does not lie to correct formal or technical mistakes, when no substantial injustice is shown to have been done. *Haven* v. *County Commissioners*, 155 Mass. 467. The motion for a further return or answer was rightly overruled.

Petition dismissed.

JOHN L. CUNNINGHAM, assignee, *vs.* JAMES F. SEAVEY.

Middlesex. March 2, 1898. — May 23, 1898.

Present: ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Insolvent Debtor — Conveyance for Benefit of Creditors — Right of Assignee in Insolvency to avoid Conveyance — Finding — Action — Defence.

An assignee in insolvency may avoid a conveyance by the debtor of all his property in trust for the benefit of such creditors as should become parties to it, made within two months before the insolvency proceedings.

In an action by an assignee in insolvency, alleging in one count a conveyance to the defendant in fraud of the insolvent law, which was a conveyance by the debtor of all his property in trust for the benefit of such creditors as should become parties to it, and alleging in another count conversion of the proceeds, a finding for the plaintiff is not open to the contention that it was unwarranted, because the defendant had ceased to act under the assignment at the time of the adjudication of insolvency, and after that he was rightfully in possession of the funds as custodian for the messenger in insolvency, and after his appointment, for the assignee in insolvency.

A person who, within two months before insolvency proceedings, has taken a conveyance by the debtor of all his property in trust for the benefit of such creditors as should become parties to it, and who has been served with a trustee writ in another State, where the debtor also had a place of business and also had instituted proceedings in insolvency, cannot relieve himself from liability to the assignee in insolvency here by depositing the proceeds of the property in the other State.

TORT, in three counts, by the assignee in insolvency of the estate of A. Anderson and Company, to recover property alleged to have been conveyed to the defendant in fraud of the insol-

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vent law, the third count alleging conversion of the proceeds. Trial in the Superior Court, without a jury, before *Hardy*, J., who allowed a bill of exceptions, in substance as follows.

It appeared that the plaintiff was appointed assignee by the Court of Insolvency for the County of Middlesex on May 23, 1895, upon the petition of creditors of the firm of A. Anderson and Company, filed April 10, 1895; and that the assignment covered all property belonging to the firm on April 11, 1895, the date of the first publication of the notice of the filing of the petition to have the firm adjudged insolvent.

The defendant testified that, at the time of the transactions in question, he lived in Dover, New Hampshire; that his firm, Charles H. Seavey and Company, were creditors of A. Anderson and Company to the amount of $3,842.02; that there was an instrument of assignment made on February 25, 1895, by A. Anderson and Company to him of all of their property, for the benefit of such creditors as should become parties to it; that at the time of the assignment A. Anderson and Company had a place of business in Boston, and one in New Hampshire; that the assignment was completed on the day of its date; that the firm of Charles H. Seavey and Company were the only creditors who signed it on that day; that as soon as he took the assignment he sent out notices to all the known creditors, enclosing a paper for them to sign in assent thereto; that after the assignment there was a creditors' meeting held in Boston; that the creditors were notified of that meeting on March 6, 1895; that at that meeting the creditors whose names appear on the original assignment, excepting Charles H. Seavey, signed; that they took further steps to get assents some time in April upon separate requests for signatures, which were signed by the creditors and returned to him; that all of the creditors whom they knew of were served with a notice of the first meeting; that all of the assents, although they came back at different times, were practically returned in the same week; that when he made up the lists of the creditors who had assented to the assignment, he did so by taking their names from these papers; that he understood on April 4 that some creditors were agitating the question of putting the firm into insolvency; that at the first meeting there was an investigating committee appointed by the creditors,

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which reported to the creditors on March 28; that as a matter of fact at that second meeting insolvency was talked of; that the committee made an elaborate report of the condition of things at that meeting, at which he was present; that he did not know that he heard the question of putting them into insolvency agitated at that time; that he was present in Massachusetts when insolvency proceedings were instituted; that hearings were had from time to time; that he was present at the hearings which were held in reference to insolvency proceedings; that after the messenger was appointed he came to the witness and told him that he was to go ahead and close matters up and turn the money over to the assignee, and that the messenger would not interfere; that he went ahead and closed matters up without any interference from the messenger or any one; that the assignment to him covered not only the stock on hand, but the book accounts that were then due to the firm; that he collected those accounts; that he worked up the lumber on hand by the creditors' order; that at the first meeting he was ordered by the creditors to go on with the business, and buy lumber and continue to manufacture; that he did go on and buy additional lumber, and kept the business going about two months; that at the second meeting of creditors he reported that he had not made money to warrant the continuing of the business, and recommended it to be stopped; that there was a little balance in his favor; that the business of A. Anderson and Company was the manufacture of boxes; that the goods were all sold to Massachusetts parties; that he received a demand at some time to pay over the money in his hands; that he did not know the exact date; that it was not immediately after the appointment of the assignee; that he was allowed to continue this business and wind it up; that the messenger was appointed on May 1, and the order for the assignee was not until May 21; that, as he recollected, it was within a week or two after May 21 that demand was made on him; that he did not pay over; that he continued the business of Anderson and Company in Boston; and that the books were kept at the Boston office.

On cross-examination, the defendant testified that, before the time of the demand for the money by the assignee upon him, he was served with a trustee writ issuing out of the Supreme Court

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of New Hampshire on February 27, 1895, in an action brought by Samuel S. Felker and Henry W. Felker against A. Anderson and Company; that before the time of such demand upon him by the assignee, he had transferred the money remaining in his hands after winding up the business to New Hampshire, and it was deposited in a Dover bank; that at the time of the service of the trustee writ all of such funds were in his hands in New Hampshire; that previously to the time of the demand by the assignee in Massachusetts he received notice in regard to proceedings in insolvency brought by A. Anderson and Company in New Hampshire, and the messenger from the Court of Insolvency in New Hampshire made demand on him to turn over the books, and everything else that he had, on May 24, 1895; that at the time of the insolvency proceedings in New Hampshire the insolvents lived in Nashua; and that the petition was a voluntary petition by them. The records of the Insolvency Court in New Hampshire, introduced in evidence, showed that the petition was dated May 21, 1895, was returnable on June 20, 1895, was continued to July 11, 1895, and then continued to September 17, 1895, and then continued *nisi*. The defendant further testified that all of the money was deposited in a bank in Dover, New Hampshire, when the New Hampshire messenger in insolvency made demand upon him; that the money was also in the same bank at the time when the writ of Felker Brothers was served upon him; and that the bank account was kept in his name as trustee.

The defendant, in answer to interrogatories by the plaintiff, stated that, at the time of the making of the assignment to him, he did not pay to the firm of A. Anderson and Company any consideration therefor; that the firm was at the time insolvent, and he knew that it was insolvent; that the instrument was made for the purpose of collecting and dividing the property of the firm among the creditors who should become parties to it outside of the Insolvency Court; that there was a majority in number and amount of the creditors who assented in writing to the assignment; that the larger part of the property when it came into his possession was situated in Nashua, New Hampshire, and consisted of unmanufactured lumber; that, at the time of the execution of the assignment, the firm had an office, where it

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kept its books and conducted its correspondence and took orders for manufactured goods, in Boston, and he took possession of the office and books, and continued the business under the direction of the majority of the creditors for the term of about two months; that the firm, at the time of the execution of the instrument, had a manufactory in Nashua, and a stock of lumber there, manufactured, in process of manufacture, and unmanufactured; that the property in Nashua came into his possession after the execution of the instrument, and there were about two hundred thousand feet of lumber, a large part of which, under the direction of the creditors, he manufactured and sold; that the property was sold principally to persons, firms, and corporations doing business in Boston and vicinity; and he gave a detailed statement of the amounts received by him and paid out in due course of his instructions from the creditors and under the instrument of assignment.

He further answered that, at the time of the insolvency in this Commonwealth, he had disposed of the property that was received under the assignment by the firm, had collected the amounts for the sale of the property, and had paid out sums of money for expenses in the manufacture of the articles and putting them into salable shape under the direction of the creditors, and at that time held a balance in money in his hands which was not distributed, and which had not yet been distributed; that the messenger of the Insolvency Court took formal possession, and notified him that he could go on and do business as he had been doing it, and collect any money outstanding; that a demand was made upon him by the plaintiff, as assignee, for the money that remained in his hands, but it had not been turned over, for the reason that, prior to the time of the appointment of the assignee, the funds which he held were trusteed by writs brought in New Hampshire against the insolvent firm; and for the further reason that all of the balance remaining in his hands was in New Hampshire at the date of the insolvency proceedings in Massachusetts, and the cash, after the time of its collection, all of which was done before the time of the insolvency proceedings in Massachusetts, had not been within this State, and thereafter the firm of A. Anderson and Company filed a voluntary petition praying that they should be declared

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insolvent in New Hampshire; and that a messenger was appointed there to take possession of the goods, effects, and credits of the insolvents in that State.

A schedule, commencing on February 26, 1895, and ending on June 12, 1895, most of the receipts being prior to May 1, 1895, showed a balance in the hands of the defendant of $1,332.36. In addition to payments to his counsel, the account showed payments to the defendant for services of $600, and for expenses of $200, which the plaintiff contended were excessive in amount, if the defendant was entitled to retain anything for these items.

At the conclusion of the evidence, the defendant asked the judge to rule that the plaintiff could not recover. The judge refused so to rule; and found for the plaintiff upon the first and third counts in the sum of $1,687.13, and for the defendant on the second count. The defendant alleged exceptions.

E. R. Anderson, for the defendant.

J. F. Wiggin, for the plaintiff.

MORTON, J. The assignment made by A. Anderson and Company to the defendant was a conveyance of all their property to him in trust for the benefit of such of their creditors as should become parties to it. It is clear that the assignee in insolvency of Anderson and Company could avoid the assignment, either on the ground that it constituted a preference to the creditors assenting to it, or was made with a view to hinder or delay the operation and effect of the laws relating to insolvency, or to prevent the property from coming to the assignee in insolvency of Anderson and Company. *Steel Edge Stamping & Retinning Co.* v. *Manchester Savings Bank*, 163 Mass. 252. Pub. Sts. c. 157, §§ 96, 98.

The defendant contends that he had ceased to act under the assignment at the time of the adjudication of insolvency, and that after that he was rightfully in possession of the funds as custodian for the messenger, and, after his appointment, for the assignee in insolvency; and therefore that any recovery against him on the ground that the assignment hindered the operation of the insolvency laws of this State, or prevented the property from coming to the hands of the assignee in insolvency, was unwarranted. But, in the first place, the court may not have found as a fact that he had ceased to act under the assignment.

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In the next place, if it did so find, it might nevertheless be true that the assignment and the possession of the defendant under it operated to hinder the effect of the insolvency laws, and to prevent the property from coming to the hands of the plaintiff. Thirdly, the defendant's contention, if true, would justify a recovery under the third count, and no harm therefore could have been done to him if the court was wrong in holding that the plaintiff was entitled to recover on the first count.

The defendant contends further that the insolvency proceedings and the trustee suit in New Hampshire relieve him from liability in this action. But it is enough to say of this contention that the court may have found that the proceedings and suit in New Hampshire were the result of collusion between the defendant and the parties instituting them, and were not instituted in good faith, and therefore were not entitled to any consideration. The defendant could not relieve himself from liability here by depositing the money in another jurisdiction.

Exceptions overruled.

JOHN C. HEIM *vs.* RICHARD H. CHAPMAN.

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Barnstable. March 3, 1898. — May 23, 1898.

Present: ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Promissory Note — Payment on Account — Statute of Frauds — Discharge in Bankruptcy as a Bar to an Action — Fraud.

The intentional omission by a bankrupt of the name of the holder of his promissory note from the schedule of his creditors in proceedings in bankruptcy under U. S. Rev. Sts. §§ 4972–5132, and the payment during the proceedings of money on account of the note by the bankrupt to the creditor, who was ignorant of those proceedings prior to beginning an action on the note, do not prevent the bankrupt from setting up his discharge in bankruptcy as a bar. The payment did not constitute a new promise in writing within Pub. Sts. c. 78, § 3, and the fact that it may have been made with fraudulent intent does not avoid the discharge.

CONTRACT, upon a promissory note. The case was submitted to the Superior Court, and, after judgment for the defendant rendered by *Wardwell*, J., to this court on appeal, upon agreed facts, in substance as follows.

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The defendant was the maker and the plaintiff the payee of the note, which was for one hundred dollars, and was dated December 6, 1870. The defendant filed a petition in bankruptcy in the United States District Court within and for the District of Massachusetts, under U. S. Rev. Sts. §§ 4972–5132, on July 26, 1873, which contained a schedule sworn to by the defendant, purporting to set forth a correct list of each and every one of his creditors, but from which he intentionally omitted the name of the plaintiff and any statement of the plaintiff's claim. On March 21, 1874, the defendant met the plaintiff, and paid him ten dollars on account of this note. On October 5, 1874, the defendant received his discharge in bankruptcy. The plaintiff did not know anything of the bankruptcy proceedings prior to the beginning of this action, which proceedings were regular and conformable to law, except so far as the failure of the defendant to make any return of the plaintiff's claim may be an irregularity. The statute of limitations had not run in favor of the defendant, by reason of his absence from the Commonwealth.

If a discharge in bankruptcy under the foregoing circumstances was a valid defence, judgment was to be entered for the defendant; otherwise for the plaintiff.

R. A. Hopkins, for the plaintiff.

C. C. Paine, for the defendant.

MORTON, J. The sole question in this case is whether the intentional omission of the plaintiff's name by the defendant from the schedule of his creditors in the bankruptcy proceedings, and the payment by the defendant to the plaintiff on the note during their pendency, prevents the defendant from setting up the discharge as a bar. The only respect in which this case differs from other cases in which a similar question has been considered by this court consists in the fact of the payment. See *Fuller* v. *Pease*, 144 Mass. 390; *Kempton* v. *Saunders*, 130 Mass. 236; *Black* v. *Blazo*, 117 Mass. 17; *Way* v. *Howe*, 108 Mass. 502.

But that did not constitute a new promise in writing within Gen. Sts. c. 105, § 8, now Pub. Sts. c. 78, § 8, which were then in force. *Jacobs* v. *Carpenter*, 161 Mass. 16. And the fact that the payment may have been made with fraudulent intent does not avoid the discharge. *Fuller* v. *Pease*, 144 Mass. 390.

Judgment for the defendant.

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WALTER O. FAULKNER & others *vs.* MANCHESTER FIRE ASSURANCE COMPANY.

Essex. March 4, 1898. — May 23, 1898.

Present: ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Fire Insurance — Waiver — Cancellation of Policy — Effect of Non-disclosure to adverse Party of Principal's Instruction to Agent.

A mistake in a proof of loss in regard to the number of the building will not affect the right of the assured to recover if the description of the building corresponded in other respects with that contained in the policy, and there is nothing to show that the insurer was misled or prejudiced by the error.

Where at the trial of an action upon a policy of insurance against loss by fire it is found that the policy had been duly cancelled before the fire occurred, it is unnecessary to decide whether there is evidence tending to show that the defendant waived the provision in the policy in regard to arbitration in case the parties were unable to agree as to the amount of the loss.

At the trial of an action upon a policy against loss by fire it appeared that the plaintiff applied for insurance to a broker, who had procured other insurance for him, and who in turn applied to an agent of the company, who issued and delivered a policy to the plaintiff; that subsequently, the defendant having requested its agent to cancel the policy, he went to the broker's office, and, the broker being absent, asked his clerk to get the policy and bring it to him for cancellation, which the clerk did before the fire occurred; that the plaintiff authorized the broker's clerk to deliver up the policy for cancellation, but not until after he should be insured in some other good company to the same amount, but such instructions were not disclosed to the defendant's agent. *Held*, that the policy was duly cancelled before the fire occurred, and that, the broker's clerk being the agent of the plaintiff, the instructions to him, which were not disclosed to the defendant's agent, could not affect the validity of the cancellation.

CONTRACT, upon a policy of insurance against loss by fire on premises situated in Lynn.

At the trial in the Superior Court, before *Dunbar*, J., there was evidence tending to show that in 1895 the plaintiffs applied for insurance upon their property, described in the policy as a "frame building occupied for the manufacture of potato chips, situate No. 6 Washington Street, Lynn, Mass.," to one Breed, an insurance broker, who had procured other insurance for them, and who made application therefor to one Madden, an authorized agent of the defendant in Lynn; that Madden issued a policy

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of the defendant company, by which the property of the plaintiffs was insured for one year from July 24, 1895, and delivered it to Breed, who delivered it to the plaintiffs; that subsequently, but previous to the fire, which occurred on August 16, 1895, the defendant requested Madden to cancel the policy, and return it to the main office of the company; that he went to Breed's office, and, Breed being absent, asked his clerk, Miss Wentworth, to procure the policy from the plaintiffs and bring it to him for cancellation; that Miss Wentworth procured the policy from the plaintiffs, and, before the fire, left it at Madden's office, saying to the clerk to whom it was handed, "There is the policy Mr. Madden wants"; that the policy was cancelled on the day it was returned to Madden; that the plaintiffs authorized her to deliver up the policy for cancellation when they were covered in some other good company for the same amount and not before, but these instructions to her were not disclosed to Madden. There was further evidence tending to show that, seasonably after the fire, the plaintiffs rendered to the defendant proofs of loss, in which the building damaged by fire was described as a "frame building 2½ stories high, occupied as a chip factory, situate No. 8 Washington St., Lynn, Mass."; that the parties having failed to agree as to the amount of the loss, they entered into an agreement of reference on October 22, 1895, according to the terms of the policy; that one referee was chosen by each of them; that these two referees accepted the appointment, appointed a third referee, and, the third referee having failed to accept his appointment or to act with the others, they proceeded to make an award; that the defendant's agent, in forwarding the award of the referees to the plaintiffs, stated that "it did not occur to me at the time of signing the agreement for submission that your policy had been cancelled, and that therefore there was no occasion for the Manchester Fire Assurance Company to enter into any reference for the determination of the amount of loss to your property. Aside from that, and if your policy had not been cancelled, the paper sent herewith is — as the statute and your policy require — an agreement for submission to *three* people. If there had been outstanding a valid policy of the Manchester Assurance Company at the date of your loss, the amount of loss — unless

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it had been agreed upon by the parties — could *only* have been ascertained by reference to *three* referees, *all* of whom must take part in ascertaining the amount of the loss. It appears from this paper that the person selected by the other two to act as a third referee never accepted his appointment, he was never sworn, and did not act with the other two. Under these circumstances, any award of the other two is, of course, invalid. The company would therefore refuse to be bound by the same, even if your policy had not been cancelled before the loss."

The judge directed the jury to return a verdict for the defendant, and reported the case for the determination of this court. If the direction was right, judgment was to be entered on the verdict; otherwise, judgment was to be entered for the plaintiffs.

W. H. Niles, for the plaintiffs.

J. D. Bryant, for the defendant.

MORTON, J. We think that the plaintiffs' right to recover was not affected by the mistake in the proof of loss in regard to the number of the building. The description of the building corresponded in other respects with that contained in the policy, and there is nothing to show that the defendant was misled or prejudiced by the error. It received the proof without objecting then, or during the subsequent negotiations, to the mistake in the number, and the jury might have found that it had waived any objection to the proof which it might have had on that ground. *Blake* v. *Exchange Ins. Co.* 12 Gray, 265. *Graves* v. *Washington Ins. Co.* 12 Allen, 391. *Underhill* v. *Agawam Ins. Co.* 6 Cush. 440.

We do not find it necessary to consider whether there was evidence tending to show that the defendant waived the provision in the policy in regard to arbitration in case the parties were unable to agree as to the amount of loss, since we are of opinion that the policy was duly cancelled before the fire occurred.

It is admitted that Madden was the agent of the defendant, and that as such agent he had authority to issue, deliver, and cancel the policy in suit; but the plaintiffs contend that, in procuring the policy and delivering it to him for cancellation, Miss Wentworth acted as his agent, and not as their agent. It was

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uncontroverted that the plaintiffs applied to one Breed to secure insurance on the building, and that he in turn applied to Madden, who issued the policy. After the policy was issued and delivered, the defendant company requested Madden to cancel it and promptly return it to the main office. Thereupon Madden went to Breed's office and told Miss Wentworth, who was the clerk in charge, that he was instructed to cancel the policy, and asked her to get it and bring it to him for cancellation, which she did. Breed had procured other insurance for the plaintiffs. It is evident, we think, that Miss Wentworth must be regarded in Breed's absence as representing him, and that in applying at Breed's office for the policy Madden treated Breed as the party who had represented and acted for the plaintiffs in procuring the insurance, and as the proper person through whom to make application for its return for cancellation. It would only be by a fiction of law, therefore, that Breed or his clerk could be regarded as Madden's agent, or as representing anybody except the plaintiffs in delivering up the policy for cancellation. And we see nothing that requires such a fiction to be imported into the case, or which will justify any other conclusion than that Miss Wentworth was the agent of the plaintiffs. That being so, the plaintiffs' instructions to her, which were not disclosed to Madden, could not affect the validity of the cancellation. *Parker & Young Manuf. Co.* v. *Exchange Ins. Co.* 166 Mass. 484.

Judgment on the verdict.

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NEWTON RUBBER WORKS *vs.* JOHN R. GRAHAM.

Suffolk. March 7, 1898. — May 23, 1898.

Present: ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Condition — Declaration — Demurrer.

Where an undertaking is conditional, the condition should be set out in the declaration as a part of the contract, and performance of it averred or the want of performance excused; and the allegation that the plaintiff has done and performed all things on his part in the agreement contained to be done and performed, and that he has kept all of the conditions of the agreement, is not sufficient.

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CONTRACT, upon a written agreement alleged to have been made by the defendant with the plaintiff. The defendant demurred to both counts of the declaration, alleging as ground therefor "that the performance of the alleged promise and agreement of the defendant was contingent upon the prior performance of a certain condition, and that it nowhere appears in either of said counts that such condition had been performed or complied with." In the Superior Court the demurrer was sustained; and the plaintiff appealed to this court.

M. Holbrook, for the plaintiff.

Z. S. Arnold, for the defendant.

MORTON, J. The body of the agreement is an engagement on the part of such creditors of the Quincy Cycle Company as shall sign it to transfer their claims to the defendant upon receiving from him notes or cash therefor as specified in the agreement. There is in it no contract on the part of the defendant that he will purchase such claims, and pay therefor in notes or cash as set forth in the agreement. The question then is whether the defendant's signature to the supplemental line, which reads, "I authorize the above offer, and agree to carry the same out if secured within the time named," imports an absolute or a conditional liability on his part, and if the latter, whether the cause of action, if any, has been well pleaded.

It is clear, we think, that the liability is a conditional one. The defendant authorizes and agrees to carry out the stipulations contained in the body of the agreement, "if secured within the time named" in it. That is plainly a conditional undertaking, and, according to well settled rules of pleading, the condition should have been set out as a part of the contract, and performance of it averred, or the want of performance excused. *Newcomb* v. *Brackett*, 16 Mass. 161. *Whitaker* v. *Smith*, 4 Pick. 83. *Stanwood* v. *Scovel*, 4 Pick. 422. *Codding* v. *Mansfield*, 7 Gray, 272. *Murdock* v. *Caldwell*, 8 Allen, 309. *Riley* v. *Farnsworth*, 111 Mass. 152. *Palmer* v. *Sawyer*, 114 Mass. 1, 13. Pub. Sts. c. 167, § 2, cl. 10. The allegation that "the plaintiff has done and performed all things on its part in said agreement contained to be done and performed, and that it has kept all of the conditions of said agreement," is not sufficient. The condition should also be set out. *Judgment for the defendant.*

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HENRY HOUGHTON *vs.* MILFORD PINK GRANITE COMPANY.

Suffolk. March 7, 8, 1898. — May 23, 1898.

Present: ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Broker — Commission — Introduction of Customer to Principal.

A broker is not entitled to a commission for services in giving information which enables his principal to find a customer, where he is in no way instrumental in bringing his principal and the customer together, and all that he does is tardily to give to the principal a part of the information which the principal has already received from other sources; and the fact that the principal in sending his estimates of prices of his goods to a number of general contractors also sends a copy to the broker, which is accompanied by a letter, stating that he includes one per cent commission in the figures for him, and the fact that the broker afterwards does nothing further to earn his commission, are to be interpreted as an offer for the future, and not an admission of existing liability.

CONTRACT, to recover a commission as broker for alleged services in giving information to the defendant which enabled it to find a customer for its goods. At the trial in the Superior Court, before *Hammond*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The material facts appear in the opinion.

J. K. Berry, for the defendant.

G. C. Coit, for the plaintiff.

HOLMES, J. This is an action to recover a commission for alleged services in giving the defendant information which enabled it to offer its granite to a customer for use in a building. The plaintiff had asked to represent the defendant in New York, and had been refused, but had been told that if he could pick up business which the defendant did not know about, it would allow him something. In 1895, Messrs. McKim, Mead, and White, New York architects, were employed to prepare plans and specifications for a memorial building at West Point. In the latter half of March the defendant was informed of this, and urged the architects to make the specifications in the alternative, so as to admit of the substitution of Milford pink granite for marble where only marble had been contemplated. This was done by an addendum to the specifications, which was furnished

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to the defendant by the architects about April 1. On April 12, New York granite brokers wrote to the defendant for a bid. The next day the defendant declined giving them one, on the ground that it did not need their assistance. On April 16, the plaintiff for the first time wrote to the defendant that there was an opportunity to sell its stone in connection with this building, enclosing a sheet showing the quantities of granite required for the base of the building, but seems to have paid no attention to the alternative specifications for the superstructure already in the defendant's hands.

Before he wrote, he had met contractors at the architects' office, and had told them that he was figuring on the granite for the defendant. Among those whom he met was a representative of the Probst Construction Company, which ultimately got the contract for building, and made a sub-contract with the defendant. But there was no evidence that the plaintiff sent this company any estimates for the defendant's granite, or that he was in any way instrumental in bringing the Probst Company and the defendant together. On May 8 the plaintiff wrote to the defendant, asking what it was going to do about furnishing granite for this building. The defendant replied that it was estimating on the granite work for several contractors, and that when its bid was prepared it would send the plaintiff its figures. The plaintiff then offered a list of contractors, and the defendant, before May 11, declined the offer, on the ground that it already had one. On May 11, 1895, the defendant sent a typewritten letter, addressed in writing to the plaintiff, containing its offer for base and superstructure. Similar letters were sent to all the general contractors who were figuring on the building. The letter to the plaintiff was accompanied by another, saying, "We include one per cent commission in these figures for you." The plaintiff replied, thanking the defendant, and did nothing further. In June, 1895, all the bids for the construction of the building were rejected, and a new call for bids was issued in December of the same year. The specifications differed from the former, providing that the whole building should be of pink, or other light colored granite, and allowing selection from a large variety of granites. In this way the chance for competition was increased. Neither the plaintiff nor the defendant

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did anything further until after the time for opening the new bids, January 13, 1896, when one of the architects got from the defendant the amount of a new bid which it had submitted on the granite, gave it to the Probst Construction Company, and urged it to make a sub-contract with the defendant. After correspondence lasting a month, this was done.

On the foregoing facts, we do not see why the case should not have been taken from the jury. We do not think that the letter of May 11, saying that the figures included one per cent commission for the plaintiff, properly could be held to constitute a waiver of the original stipulation that information must be about matters which the defendant did not know about before, if it was to be paid for. But at all events the defendant could not waive the necessity for a consideration to a simple contract. We are unable to discover anything done by the plaintiff which can be supposed to have been the conventional inducement for a promise on the defendant's part, or, conversely, any offer by the defendant to pay for anything which the plaintiff did.

It appears to us, on the whole case, that all that was offered to the plaintiff was the chance of earning a commission as a broker by introducing a customer, or giving information of such sort as should bring about a bargain. Very likely it is true, as was testified, that a broker of this kind can do little beside introducing the parties, and that persuasion is no part of his business or duty. But we see no reason to admit that he earns a commission unless he brings about a contract by introduction or information, and we see no sufficient evidence that the defendant specially undertook to pay the plaintiff for anything less. On the contrary, the fair inference is that, when beset by his urgency, it informed him that, if he could earn money as a broker, he was at liberty to do so, and promised him nothing more.

It appears to us, also, that all that the plaintiff did was, by his letter of April 16, tardily to give the defendant a part of the information which it already possessed.

When on May 11 the defendant spoke of a commission for the plaintiff, the natural interpretation, to our mind, is in accordance with the defendant's testimony that it was an offer for the future, not an admission as to the past, and nothing was done

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to earn the commission after that date. But however the letter be interpreted, what the defendant offered, and what the plaintiff did, is all before us, and we think it plain that the plaintiff did nothing for which the defendant offered to pay.

Exceptions sustained.

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SMITH AND DOVE MANUFACTURING COMPANY *vs.* TRAVELERS' INSURANCE COMPANY.

Essex. March 11, 1898. — May 23, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Insurance — Notice of Loss.

Where a policy of insurance against loss from liability to employees injured in the course of their employment contains a proviso that the assured shall give the company "immediate written notice" of the happening of an accident within its terms, a notice of such accident given twenty-six days after it occurred is not a compliance with the condition, and the fact that the intention of the assured to send notice was interrupted by a strike of his employees, which gave him a great deal of trouble, and caused him for the time to forget the notice, is not an excuse for not complying with the condition of the policy.

CONTRACT, on a policy of insurance against loss from liability to employees injured in the course of their employment. Trial in the Superior Court, before *Dunbar*, J., who directed the jury to return a verdict for the defendant, and, at the request of the plaintiff, reported the case for the determination of this court.

If the ruling was wrong, the case was to be remitted to the Superior Court for a new trial; otherwise, judgment was to be entered on the verdict. The facts appear in the opinion.

J. P. Sweeney, for the plaintiff.

S. Lincoln, for the defendant.

HOLMES, J. This is an action upon a policy of insurance against loss from liability to employees injured in the course of their employment. There is no dispute that a loss happened that was within the policy, and the only defence is that the plaintiff did not give the defendant "immediate written notice"

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of the accident, as required by a proviso of the contract. The accident happened on May 28, 1895, and was at once known and inquired into by the plaintiff's manager, whose duty it was to send the defendant the notice required. But his intention to send notice was interrupted by a strike, which gave him a great deal of trouble, and to which the details of management were subordinated, but, as he very candidly testified, without being wholly given up. The result was that he forgot the notice, or assumed that it had been sent, and that he failed to send it until June 24. These are the facts, and we are of opinion that they show neither a compliance with the condition nor an excuse for not complying with it, even under most of the cases cited in the decision of the majority in *Harnden* v. *Milwaukee Mechanics' Ins. Co.* 164 Mass. 382. It is impossible to say that notice after a month's delay, due only to the forgetfulness of the agent in charge, is an "immediate notice" in any sense. If the word "immediate" is satisfied by the use of reasonable diligence on the part of the insured, such diligence is not made out by evidence that an agent upon whom he relied to give notice had a paramount but not exclusive interest in his head which drove out the contract's requirement and made him forget it. *Railway Passenger Assurance Co.* v. *Burwell*, 44 Ind. 460, 463, 464. *Whitehurst* v. *North Carolina Ins. Co.* 7 Jones, (N. C.) 433. *Trask* v. *State Ins. Co.* 29 Penn. St. 198. *Edwards* v. *Lycoming County Ins. Co.* 75 Penn. St. 378. *Inman* v. *Western Ins. Co.* 12 Wend. 452, 460.

Judgment on the verdict.

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ANTONIO CAVAGNARO *vs.* WILLIAM L. CLARK.

Suffolk. January 18, 1898. — May 24, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

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Personal Injuries — Employers' Liability Act — Due Care — Negligence of Superintendent — Law and Fact.

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In an action under the employers' liability act, St. 1887, c. 270, it appeared that the plaintiff was engaged in carrying bricks in a wheelbarrow from an elevator to masons at work on a building; that he returned with his empty wheelbarrow for the purpose of descending with it on the elevator; that A., the defendant's superintendent, was standing on the elevator as he approached it; and that it was the custom, when a person had so placed himself on the elevator, for any one standing near to press the button near by as a signal to lower the elevator. The plaintiff testified that he asked A. if he had room to put his wheelbarrow on, and A. replied that there was not much room; and that he put the wheelbarrow on the elevator, and had one foot on it when it started down, causing him to fall. A. testified that he jumped upon the elevator and said, "Let her go"; that a workman who was standing near pressed the button and shouted, "Stand clear"; that a minute or so later the elevator started down; and that the first he knew of the plaintiff's being near was when he turned and saw him falling. *Held*, that the questions whether the plaintiff was using due care, and whether his injury was caused by the negligence of A. while exercising superintendence, were for the jury.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ, by the alleged negligence of a person in such employ intrusted with and exercising superintendence, and whose sole or principal duty was that of superintendence. Trial in the Superior Court, before *Hardy*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff testified that he was a laborer, and in April, 1895, was working for the defendant on a building in Boston; that he had been working on this building for two or three months prior to the accident; that on the day of the accident he was carrying bricks and mortar from the elevator to the masons at work on the walls; that he had taken a wheelbarrow full of bricks from the elevator, which had brought it up from the basement to the floor on which he was working, had emptied the wheelbarrow and was bringing it back to the elevator; that one Smith, the defendant's superintendent, was standing on the ele-

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vator as he approached it; that the plaintiff asked Smith if he had any room on the elevator to put his wheelbarrow; that Smith replied that there was not much room on the elevator at the time; that he put the wheelbarrow on the elevator, and had one foot on the elevator when it started down with Smith on it, causing him to fall; that nobody spoke to him at that time about the elevator starting; that the usual method of starting the elevator up and down was for any one of the laborers to press the button placed near the elevator well, which rung an electric bell down below for the engineer; that the elevator was operated by steam, and the signal for moving it was to ring the bell once to go down; that when the foreman or some of the laborers went down on it, they used to ring the bell three times; that when he saw Smith on the elevator there was another man, a laborer, standing beside him; and that the plaintiff did not hear the bell rung or anything said to him.

On cross-examination, he testified that he had used this elevator more than twenty times that day before the accident; that he had worked about four weeks on work that required him to use this elevator; and that during this period he had used it every day.

On re-direct examination, the plaintiff testified that he used the elevator when he had to send the wheelbarrows down; that he did not go down on the elevator to get the bricks, but that he did go up on the elevator when he went to work in the morning, also at dinner time and in the evening when he got through work; that when he wanted to go up, he used to ask the engineer to carry him up; and that sometimes he used to ring the bell.

Patrick Connors, called as a witness by the plaintiff, testified that he was employed by the defendant as a hod carrier at the time of the accident; that just before the accident he had carried a hod off the elevator; that Smith was on the elevator and had been there about two minutes; that the witness rang the bell three times because Smith told him to "ring the bell and let him off at the second floor"; that Smith was the foreman, and just before the plaintiff fell "was bossing all of us"; and that Smith said nothing except for the witness to ring him down, and let him off at the first floor.

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On cross-examination, he testified that he had worked on the building for a month or six weeks; that the plaintiff was working there when he came; that the plaintiff used the elevator in bringing his wheelbarrows up, as well as every other man; that he used to use the elevator every day, and rang the bell if it was necessary to have the elevator come down or go up; that he had seen him doing that a great many times; that all the men, including the plaintiff and himself, used the elevator to go up on in the morning and down at noon; that any man who wanted the elevator would ring this bell; that they shouted, when they rang the bell, to stand clear from under; that Smith was standing on the elevator near the witness, and the hods on the elevator were above his head so that Smith could not see through them; that the witness could not see through them, and Smith was standing "right up to him"; that Smith told him to ring the bell, and to leave him at the second floor; that he rang the bell once, and then the elevator started; and that if he had rung it again he could have stopped the elevator, but he was excited, and did not ring it because he saw the plaintiff falling.

On re-direct examination, the witness testified that after the elevator had started and after he saw the plaintiff fall, or at the moment he saw him do anything, he did not hear Smith say anything.

Jeremiah Murphy, called as a witness by the plaintiff, testified that, at the time of the accident, he was employed as a hod carrier by the defendant on the building in question, and was working on the floor underneath the floor which the plaintiff fell from, and saw the plaintiff falling as the elevator descended carrying Smith, whose head was above the hods; that he very often rang the bell to ring the elevator up and down; that every man on the floor used it to get stock up on the floor; that the signals of the bell were three bells to go down when there was a man on it, and one bell to stop it if it was going down, and two bells when there was nobody on it.

On cross-examination, he testified that he used the elevator as he came up in the morning, when he went down at noon, and at five o'clock when he stopped work, and at any other time when he needed it.

James Reardon, called as a witness by the plaintiff, testified

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that, at the time of the accident, he was employed by the defendant as a hod carrier in the building in question; that he was working on the same floor that the plaintiff fell from; that the elevator was generally used to hoist up stock; that the laborers used the elevator in going to and from their work, and also through the day, riding up or down with their loads; that anybody who was near it would press the bell; that just before the accident, while Smith was standing on the elevator, the witness had put a hod on it and had walked away five or six feet; that he then turned round and saw the plaintiff falling and Smith going down in the elevator, Smith's back being turned towards the witness and away from the side of the floor on which the witness and the plaintiff had been working; and that neither just before nor at the time of the accident did he hear anything.

On cross-examination, he testified that he used the elevator morning, noontime, and evening, and sometimes through the day; that if he was next to the bell, and there was a man on the elevator, the latter would tell him to ring the bell; and that it would not make any difference whether it was Smith on the elevator or anybody else.

George H. Smith, called as a witness by the defendant, testified that he was employed as foreman by the defendant at the time of the accident, and laid out the work for the men, saw it was done properly, and kept them in stock; that he was standing in the elevator with his back towards Washington Street, and had his arm on the rack for the hods when it started down at the time of the accident; that he had no conversation with the plaintiff, who approached the elevator from the Washington Street side of the building; that the first thing he knew of the plaintiff's being near the elevator was when he turned round and saw him falling; that he saw the barrow coming just ahead of the plaintiff, but did not think it was wholly on the elevator; that the elevator stopped within two stories of the bottom, he thought; that as to calling the elevator to send it down, generally the last man who took his hod off did it, but "when they see it is all unloaded and wants to go down, the man that stands nearest to that button will send it down"; that as the witness approached the elevator, Connors was standing near the button;

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and that the witness jumped on the elevator and said, "Let her go," and thereupon Connors rang three bells and shouted, "Stand clear," and a minute or so later the elevator started down.

On cross-examination, after testifying that he attempted to catch hold of the plaintiff as he fell towards the elevator, he testified, among other things, as follows: "*Q.* Why did n't you call to Connors, 'Stop this elevator'? *A.* Well, when that starts, you hardly have time to do anything. I did n't think, and if I had, it would n't have made any difference. — *Q.* And after jumping on and saying, 'Let her go,' and resting with your arm on the rack facing towards Boylston Street, you did not see the plaintiff? *A.* No, I was n't facing that way. — *Q.* And the elevator immediately started? *A.* No, sir; it did not immediately. — *Q.* How long after the push button? *A.* I could n't tell. It might have been a half a minute or a minute perhaps. I don't know. — *Q.* Or it may have been immediately? *A.* I hardly think; no, it could n't have been, not right off. — *Q.* Did you say 'Let her go,' before you got on the elevator or after? *A.* I said 'Let her go' before I got on; run right to it and said 'Let her go,' and jumped on. — *Q.* And after you said 'Let her go,' did you look at Connors? *A.* He rang the bell; I know he was there; I saw him. — *Q.* Was n't it a rather slow elevator? *A.* Yes; slow running. — *Q.* And when three bells were rung it went down more slowly than it did at other times? *A.* Yes. — *Q.* Then it was going slowly? *A.* Yes, sir. — *Q.* Did n't that give you plenty of time to yell back to Connors as soon as you saw the plaintiff, 'Stop'? *A.* Perhaps it might, but it would n't have done any good. — *Q.* You thought it wouldn't do any good? *A.* I did n't think anything about it. All I thought of was trying to catch this man."

At the conclusion of the evidence, the defendant requested the judge to rule that, upon all the evidence, the plaintiff could not recover; that Smith at the time of his alleged negligence was not exercising superintendence; and that the plaintiff could not recover, even if the jury should find that Smith was negligent. The judge refused so to rule; and the defendant excepted.

The judge instructed the jury, among other things, as follows:

"The principal question for you to consider is whether or not Smith was exercising superintendence at the time of this

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accident. Now, what is it to exercise superintendence? Certain acts have to be considered, and if you find that those acts were performed by this superintendent, it would be the duty of the court to instruct you that he would be a superintendent within the meaning of the law. Now, the question is, was Smith engaged in controlling the actions of men who were in the employment of the defendant? [Was he engaged at the time of the accident in exercising control or directing the actions of the employees of the defendant? You have heard the testimony as to what he was doing just previous to the time that he entered upon the elevator. Was he then controlling the men and ordering them and directing them to do certain things by reason of their employment by the defendant and by reason of his position as superintendent? When he entered upon the elevator, it is for you to consider whether he was then directing the movements of this elevator by reason of his position as a superintendent. If you find from all these facts that he was directing the action of the fellow servants of the plaintiff at that time, and by reason of his acts he so far controlled their action that he set any dangerous machinery in motion, it is an issue on which you are to pass, whether or not he was acting in controlling and directing the movements of this machinery at the time. If you find that he was controlling the action of these fellow employees and directing them, it would be your duty to find that he was exercising an act of superintendence at that time.]

"The next question is whether or not he was acting as a fellow servant of the plaintiff. A man may be a superintendent with reference to controlling men in the same common employment with the plaintiff, and in other instances he may be simply a fellow servant. For instance, if you should find on all the facts here that he simply went on to that elevator the same as any other servant in the employment of the defendant, and simply went on there to ride down the elevator without any act of control on his part, it would be your duty to find that he was acting simply as a fellow servant. For instance, if he should get on there and should not act in any such way as to order the elevator to be moved by reason of the fact that he was acting as superintendent, that would be the act of a fellow servant. It is for you to consider whether when he went down that elevator

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he was acting as a fellow servant, or whether he did exercise any control which would be that of a superintendent in directing the movements of the elevator. If you find he did not exercise any control as a superintendent in directing its movements, his action would be that of a fellow servant, and you would have to find for the defendant."

The defendant excepted to that portion of the charge enclosed in brackets.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. Lowell, for the defendant.

J. R. Murphy, for the plaintiff.

BARKER, J. 1. Whether the plaintiff was guilty of contributory negligence was a question for the jury. The evidence would warrant a finding that when he attempted to put his wheelbarrow upon the elevator platform, the platform was standing at the level of the floor, and that its descent had not yet begun. Assuming that he knew that the superintendent who stood on the platform had placed himself there to be lowered with the platform, and that it was the custom when any person so placed himself on the platform for any one standing near to press the button as a signal for the engineer below to lower the platform, and that there was always an interval between the pressing of the button and the beginning of the descent, so that the signal to lower might have been given before the plaintiff came with his wheelbarrow, he testified that he asked Smith, the superintendent, if he had room to put his wheelbarrow on, and that Smith replied that there was not much room. From this reply the jury could find that the plaintiff understood the superintendent to assent that the plaintiff should put the wheelbarrow on, and that the plaintiff could reasonably infer that he could safely proceed, especially if he had not heard the previous warning to "stand clear."

2. It was also a question for the jury whether the plaintiff's injury was due to the negligence of a "person in the service of the employer, intrusted with and exercising superintendence," within the meaning of St. 1887, c. 270, § 1, cl. 2. So far as appears, the sole duty of this superintendent was that of superin-

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tendence, and in riding upon the elevator from the floor of the building on which he stood to a lower floor he was acting in the service of his employer. He testified that he jumped upon the elevator and said, "Let her go," and that thereupon a workman who was standing near the button, rang three bells and shouted, "Stand clear," and that a minute or so later the elevator started down, and that the first he knew of the plaintiff's being near was when he turned and saw the plaintiff falling. The order, "Let her go," was itself an act of direction or oversight, tending to control others, and to vary their situation or action because of his direction. *Cashman* v. *Chase*, 156 Mass. 342. Having given the order, and seen that it was followed by the signal the giving of which would cause the elevator to descend, it would be his duty to countermand his order and to take means to prevent the elevator from going down, if after the giving of the signal he had reason to suppose that another person was about to attempt to put a wheelbarrow upon the platform, and that he had such reason might be found from the plaintiff's testimony. This duty of countermanding the order which he had given, or of taking some means to prevent the injury of a workman whom he knew was about to put himself in danger by doing an act which would have been safe but for the fact that the elevator was about to go down, was itself a duty of superintendence, a duty to perform an act of direction or oversight tending to control others, and which his position as superintendent required him to give, and made it negligence in his work of superintendency not to give. *McCauley* v. *Norcross*, 155 Mass. 584.

If he had been merely an ordinary fellow workman with the plaintiff, the acts which he did and those which he ought to have done, both in ordering that the elevator should be sent down, and in ordering that the signal to lower should be countermanded, or in ordering the plaintiff not to proceed when he found that the plaintiff was about to put on his wheelbarrow, would have been in effect acts of superintendence. In that case the defendant would not have been liable for these acts of superintendence, because they were not acts of any person intrusted with and exercising superintendence, whose sole or principal duty was that of superintendence, and the employer is not made answerable by the statute for acts of superintendence negligently performed in

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his service by an ordinary workman, or by one who is both workman and superintendent, in making declarations which may be interpreted either as orders of a superintendent or as assurances of a fellow workman, if in fact they are merely such assurances. *Whittaker* v. *Bent*, 167 Mass. 588.

In the present case the superintendent had no other duty than that of superintendency, and when he negligently gave orders, or negligently omitted to give them when required by his position, his employer is answerable. In the opinion of a majority of the court the entry should be, *Exceptions overruled.*

HENRY F. MAY *vs.* NEW ENGLAND RAILROAD COMPANY.

Norfolk. March 22, 1898. — May 25, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Petition to quiet Title — Easement.

One who has only an easement, and who does not complain that his rights have been interfered with, cannot be compelled, under St. 1898, c. 340, to bring an action at law or a suit in equity to try his alleged right.

PETITION, under St. 1893, c. 340, entitled "An Act relative to quieting titles to real estate." Hearing before *Morton*, J., who entered a decree directing the respondent to bring an action at law or a suit in equity, as it might be advised, to try its alleged right; and the respondent alleged exceptions. The facts appear in the opinion.

F. A. Farnham, for the respondent.

R. M. Saltonstall, (*G. M. Cushing* with him,) for the petitioner.

ALLEN, J. This is a petition under St. 1893, c. 340, to compel the respondent to bring an action to try its alleged title to a strip of land which the petitioner claims to own in fee, but in which the respondent claims to have an easement by virtue of the location of its railroad, made by one of its predecessors in title about 1851. The boundary line between the land taken for the railroad and the other land of the petitioner is in con-

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troversy. The strip of land in dispute has never been occupied by the respondent or its predecessors, but it is in the possession of the petitioner, who has some coal sheds which cover a portion thereof. The respondent contends that it has never abandoned its easement, and that it now has a right under its location to occupy the land when it may judge it to be necessary for railroad purposes. The respondent asked the court to rule that "as to such portion of the land included in the petition which is within the limits of the petitioner's deed, and also within the limits of the respondent's location, but which has not yet been occupied or reduced to possession by the respondent, the respondent is under no obligation to exclude the owner and reduce the same to possession until in its opinion it becomes necessary and proper in the conduct of its business," and that as to such portion the petition is not maintainable. The court did not undertake to determine whether, in point of fact, any land included in the petition was within the limits of the respondent's location, and ruled that it was not required to do so, but only to determine whether the petitioner was in exclusive possession of the premises which he claimed, and whether the respondent made any adverse claim to the same or to any part thereof; and, finding in the affirmative of both of these propositions, it refused to give the rulings requested, and entered a decree directing the respondent to bring an action at law or a suit in equity, as it might be advised, to try its alleged right.

We are not aware of any previous instance where one whose only claim was a right to an easement has been required to institute proceedings to try its extent or validity. It has usually been assumed that the action contemplated by the statute is a writ of entry, or possibly an action of tort in the nature of trespass. *Tisdale* v. *Brabrook*, 102 Mass. 374. *Orthodox Congregational Society* v. *Greenwich*, 145 Mass. 112. *Brown* v. *Matthews*, 117 Mass. 506, 509. *Silsbee* v. *Salem*, 103 Mass. 144. In the present case, the respondent could not maintain a writ of entry, having no seisin of the land; *Rehoboth* v. *Hunt*, 1 Pick. 224; nor trespass, being out of possession. The petitioner suggests that, if the respondent were to demand the removal of the coal sheds, it might then assert its claim of right by an action of trespass. But no good reason appears for requiring it to make a

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demand for land which it does not now need, even if the court has power to do so. See *Stone* v. *Houghton*, 139 Mass. 175. Where land is taken for a railroad, the original owner retains all his rights which are consistent with the full enjoyment of the easement acquired by the railroad company. The two rights exist together, and the railroad company is not legally injured by any use of the land by the owner which does not interfere with the easement taken. *Tucker* v. *Tower*, 9 Pick. 109. *Denniston* v. *Clark*, 125 Mass. 216, 221. *Allen* v. *Boston*, 159 Mass. 324. *Butchers' Slaughtering & Melting Association* v. *Commonwealth*, 163 Mass. 386, 390. With growing needs the company's right of use may increase, and that of the original owner may decrease. The railroad company is not limited in its right by the use which it makes at the outset, and it may determine from time to time how large a use is required. *Brainard* v. *Clapp*, 10 Cush. 6. *Barnes* v. *Boston & Maine Railroad*, 130 Mass. 388. So long as its uses of the land or its needs are not interfered with, no legal right to which it is entitled is violated, and it has no occasion to institute any proceedings at law or in equity to establish or vindicate such right. A respondent will not be required to bring a suit unless it is made to appear that the right which he claims can be fairly and conclusively tried by such a suit as may be directed. *Boston Manuf. Co.* v. *Burgin*, 114 Mass. 340. Usually the order specifies the form of process to be brought, but no form of process was specified in this case, and none to which the respondent can resort, upon the facts which now exist, has been pointed out, and none occurs to us. The case of *New York, New Haven, & Hartford Railroad* v. *Benedict*, 169 Mass. 262, differs from this, in that the plaintiff there asserted that its rights had been interfered with.

This view is confirmed when we consider that the petitioner is under no such disability. We see no jurisdictional reason to prevent him from maintaining a bill in equity to remove a cloud upon his title, and in this way having his boundary line determined. It is true that the burden of proof will be upon him to show the extent of his ownership; but this is no objection to leaving him to pursue a remedy in his own name, instead of seeking to compel the respondent to go forward. *Tompkins* v. *Wyman*, 116 Mass. 558, 561.

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For these reasons, the respondent ought not to be compelled to bring an action at law or a suit in equity, according as it may be advised, to try its alleged right.

Exceptions sustained.

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PATRICK LENNOX & another *vs.* PATRICK MURPHY & another.

Essex. March 30, 1898. — May 31, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Guaranty — Construction — Consideration — Notice of Acceptance — Performance — Action.

B. executed to A. a guaranty "to the extent of ten thousand dollars, on obligations contracted and to be contracted by C. with A. for a period of three years, with the understanding that A. give C. a permanent credit of at least twenty thousand dollars in leather for the above period of three years." Before B. signed the guaranty C. exhibited to him an instrument to be signed by A. and told him the contents of it, and told him also that, if he would sign the guaranty, it would keep C. on his feet and keep him going. A. signed the instrument, which was as follows: "For one dollar and other considerations, I, A., guarantee C. a permanent credit for three years to the amount of twenty thousand dollars in leather, and agree that C. shall not owe A. less than twenty thousand dollars at any time during this period, except at his own option, and C. agrees to buy leather from A. to the extent of at least twenty-five thousand dollars per annum, and A. agrees to sell C. as cheap as any reliable shoe manufacturer. This agreement to be null and void in case C. becomes insolvent during this period." *Held,* in an action by A. against B. on the guaranty, that, when the instrument was signed, the consideration for the guaranty was furnished; that the circumstances might be considered in aid of the interpretation; and that the words "with the understanding" referred to the instrument so signed.

If a guaranty by B. to A. of obligations to an amount named to be contracted by C. with A. for a certain period is executed on the understanding that, if it is signed, A. will sign an instrument, which is exhibited to B., agreeing to give C. a credit for that period, it is not necessary that B. should be notified of the acceptance of the guaranty by A.

It is no objection to an action upon a guaranty to a certain amount "on obligations contracted and to be contracted" by C. with A., with the understanding that A. give C. a credit of a sum named in merchandise, that, although C. owes A. more than that sum, only a portion of it is in the form of a debt for merchandise, and the rest is in the form of notes, which were given for merchandise.

A guaranty executed by B. to A. to a certain amount on obligations to be contracted by C. with A. "for a period of three years," with the understanding that A. give C. a credit of a sum named "for the above period of three years," may be sued upon before the expiration of the three years.

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CONTRACT, against Patrick Murphy and Michael Murphy, upon a guaranty, dated August 17, 1895, and signed by the defendants. Writ dated August 29, 1896. Patrick Murphy alone defended. Trial in the Superior Court, without a jury, before *Sheldon*, J., who found for the defendant; and, with the consent of the parties, reported the case for the determination of this court. The facts appear in the opinion.

H. F. Hurlburt & E. T. McCarthy, for the plaintiffs.

J. P. Leahy, for Patrick Murphy.

HOLMES, J. This is an action on a guaranty "to the extent of ten thousand dollars, on obligations contracted and to be contracted by Murphy Brothers with P. Lennox & Co., for a period of three years, with the understanding that P. Lennox & Co. give Murphy Brothers a permanent credit of at least twenty thousand dollars in leather for the above period of three years." The action is defended only by Patrick Murphy. At the trial in the court below, after the evidence was in, the judge found for the defendant, and the case is here on a report, by the terms of which, if the ruling was wrong, judgment is to be entered for the plaintiffs. The grounds mainly urged in support of the ruling are want of consideration, and a failure to notify the defendant of the acceptance of the guaranty.

There was evidence that, before Patrick Murphy signed the guaranty, one of the firm whose obligations were to be guaranteed exhibited to him an instrument to be signed by the plaintiffs, and told him the contents of it, and told him also that if he would sign the guaranty it would keep the speaker on his feet and keep him going. The only reasonable inference from this and other evidence is that, in spite of the usual formula, "For one dollar and other considerations," the guaranty in fact was executed in consideration of the plaintiffs' signing the other instrument referred to, and that Patrick Murphy understood, when he signed, that if he signed the plaintiffs would sign. The plaintiffs signed as expected.

The instrument executed by the plaintiffs was as follows: "For one dollar and other considerations, we, P. Lennox & Co., guarantee Murphy Brothers a permanent credit for three years to the amount of twenty thousand dollars in leather, and agree that Murphy Brothers shall not owe P. Lennox & Co. less than

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twenty thousand dollars at any time during this period, except at their own option, and Murphy Brothers agree to buy leather from P. Lennox & Co., to the extent of at least twenty-five thousand dollars per annum, and P. Lennox & Co. agree to sell Murphy Brothers as cheap as any reliable shoe manufacturer. This agreement to be null and void in case Murphy Brothers become insolvent during this period. P. Lennox & Co."

When this paper was signed, the consideration was furnished and the offer in the defendants' instrument became a contract, unless some one of the objections which we shall mention bars the way. The gravest of these is that the plaintiffs' undertaking does not satisfy the stipulation in the defendants' guaranty. The guaranty calls for a permanent credit of at least twenty thousand dollars for three years. The plaintiffs' agreement contains a statement that Murphy Brothers agree to buy leather to the extent of at least twenty-five thousand dollars per annum, and it might be held that the failure of Murphy Brothers to buy to that extent would excuse the plaintiffs from their undertaking, or in other words that Murphy Brothers' performance of their agreement is introduced as a condition into an undertaking to do what is called for unconditionally by the guaranty. It may be that this objection would be fatal if the guaranty had called in the same terms for a counter agreement not yet framed. But, as we have said, in fact the words were an abbreviated reference to a paper already in existence although not yet signed. It is plain that the words of the guaranty need construction. It is not to be supposed that the giving of credit for three years is contemplated as the consideration, for that would leave the guarantors unbound until the three years had elapsed. The consideration must be a promise to give credit. But the operation of the promise as consideration has to be proved by evidence outside the writing. The words on their face do not go further than to state a condition, if they do that. *Curtis* v. *Hubbard*, 6 Met. 186, 191, 192. The question is whether in that aspect they do not state an absolute condition, — whether they are open to explanation from the circumstances. We are of opinion that the circumstances may be considered in aid of the interpretation. The words "with the understanding," when read in connection with the facts, refer to an understanding

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already reached and put in writing, a counter agreement by the plaintiffs with the partners guaranteed. This counter agreement is absolute and free from other condition than the performance of the consideration, and for purposes of reference it is not necessary to set out this necessarily implied term any more than it is in the case of a memorandum of a promise under our statute of frauds. *Hayes* v. *Jackson*, 159 Mass. 451.

The proviso that the plaintiffs' agreement shall be void in case Murphy Brothers become insolvent during the period of its running only expresses what would be implied in any event. For although it has been said that an agreement to sell — even it would seem to a partnership, which is dissolved by insolvency — is not discharged by insolvency, yet it is agreed that insolvency would put an end to the right to purchase on credit or without a tender of the price. *Morgan* v. *Bain*, L. R. 10 C. P. 15, 21, 27. See *Cremer* v. *Higginson*, 1 Mason, 323, 337. The obligation to sell on credit was all that concerned the defendant. Moreover, if what we have said as to the reference to this document is correct, it is taken up with all its terms into the defendant's undertaking.

But it is objected further that acceptance of the guaranty, or, more strictly, the furnishing of the consideration by the plaintiffs, was not communicated to the defendant. We are of opinion, as we have said, that it would have been open to the presiding justice to find that the guaranty was signed on the understanding that, if it was signed, the plaintiffs would sign. If so, when the understanding was carried out, it was not necessary to notify the defendant. He already had all the notice he needed, and to send him notice would have been merely a formal act, which is not required either by custom or by the theory of contract. There is no universal doctrine of the common law, as understood in this Commonwealth, that acceptance of an offer must be communicated in order to make a valid simple contract, although such a necessity might be inferred from some of the language in *Davis* v. *Wells*, 104 U. S. 159, and *Davis Sewing Machine Co.* v. *Richards*, 115 U. S. 524. See *Paige* v. *Parker*, 8 Gray, 211; *Hatch* v. *Hobbs*, 12 Gray, 447; *First National Bank* v. *Watkins*, 154 Mass. 385, 387, 388; *Bishop* v. *Eaton*, 161 Mass. 496, 499; *Bascom* v. *Smith*, 164 Mass. 61; *Brogden*

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v. *Metropolitan Railway*, 2 App. Cas. 666, 691; Harriman, Contracts, 86–89; Langdell, Contracts, §§ 2 *et seq.*

If a contract was made, the only remaining objections urged against the plaintiffs' recovery are that they did not perform their contract, and that they could not sue until after the three years had elapsed. The former proposition is put upon the ground that, although Murphy Brothers owed the plaintiffs more than $20,000, only the sum of $16,000 was in the form of a debt for merchandise, and the rest, $8,000, was in the form of notes. The notes were given by Murphy Brothers for leather, and we do not perceive what difference the change in the form of the indebtedness made with regard to the plaintiffs' contract, although as a matter of bookkeeping the notes may have been charged on a separate page. *Norton* v. *Eastman*, 4 Greenl. 521, 525. There is nothing in the guaranty which requires the plaintiffs to wait three years before bringing suit. *Marsh* v. *Day*, 18 Pick. 321. *Judgment for the plaintiffs.*

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J. THEODORE HEARD & another, trustees, *vs.* JOHN READ & others, executors, & others.

Suffolk. January 24, 25, 1898. — June 2, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Will — Termination of Trust — Power of Trustees to sell Real Estate after Death of Life Tenant, and divide Proceeds.

Where the power to sell real estate is given to trustees by will for the purpose of changing investments of the trust property and of performing the duties of the trust, when the trust terminates by the death of the life tenant this power ceases to exist.

BILL IN EQUITY, by the trustees under the will of John W. Trull, to obtain the instructions of the court as to its construction. After preliminary provisions he gave the residue in trust:

"To receive and collect the income and produce thereof, and, after deducting all needful and proper costs, charges, and expenses, to pay the residue of said income from time to time,

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into the proper hand, or upon the written order of my said daughter, Mrs. Elizabeth Eldredge, for her sole and separate use, free from the control or interference of any husband, or liability for his debts or engagements.

"At and after the decease of my said daughter, I give the said trust premises to her issue, equally to be divided between and among them, if more than one, in fee simple, the children of any deceased child of my said daughter to take the parent's share by representation.

"If my said daughter shall leave no issue surviving her, the trust premises shall, at her decease, be divided into two equal parts or portions, one of which parts shall go to and be held by the said John T. Heard and his heirs in fee forever, and the other part shall be divided among my heirs at law, as though I died intestate.

"I give my said trustees and their successors, and any persons acting as trustees under this will, full power and authority to sell any and all real estate of which the trust premises shall be at any time composed, and to make any and all deeds, and do any and all acts necessary or proper for carrying into full effect any and all such sales; and the purchasers from such trustees shall not be bound to see to the application of the purchase money.

"And I give my said trustees, and their successors, and any persons acting as trustees under this will, full power and authority to invest, reinvest, and change any and all property of which the trust premises shall be at any time composed, in such manner as they may deem most beneficial for the parties interested in the fund, but I recommend them, whenever a good opportunity offers, to invest the trust moneys in real estate, situate in the city of Boston, which I consider the best and safest investment, or in notes secured by mortgages of real estate in said city."

After the hearing reported 169 Mass. 216, the case was submitted upon the bill, answers, and an agreed statement of facts to *Allen* J., who reserved for the consideration of the full court the question, undecided in the former opinion, whether the trustees had power to sell the real estate, the life tenant having deceased, and divide the proceeds among those entitled thereto.

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S. Lincoln, for J. Theodore Heard.

G. F. Richardson & F. N. Wier, for the heirs of John W. Trull at the death of Elizabeth Eldredge.

FIELD, C. J. The question here presented was left undecided in the former consideration of this case. *Heard* v. *Read*, 169 Mass. 216. We are of opinion that the trustees took, either in fee or for the life of Mrs. Eldredge, the legal estate in the real property given in trust by the testator. *Sears* v. *Russell*, 8 Gray, 86. The trust is, "To receive and collect the income and produce thereof, and, after deducting all needful and proper costs, charges, and expenses, to pay the residue of said income from time to time into the proper hand, or upon the written order of my said daughter, Mrs. Elizabeth Eldredge, for her sole and separate use, free from the control or interference of any husband or liability for his debts or engagements."

During the life of Mrs. Eldredge the remainder after the termination of her equitable life estate was contingent, whether that remainder be legal or equitable, but on her death the remainder vested one half in John T. Heard and the other half in the heirs of the testator, determined as of the time of Mrs. Eldredge's death. Whether the trustees still hold the legal estate in the real property, or it is vested in John T. Heard and the heirs of the testator, is a question which we have not found it necessary to decide. If it was the intention of the testator that the power to sell the real estate should remain in the trustees after the death of Mrs. Eldredge, or that the trustees after her death should be charged with the duty of making sale or partition of the real estate, then we should be of opinion that the trustees took the legal estate in fee, and that this estate did not on her death immediately vest in John T. Heard and the heirs of the testator. If such was not the intention of the testator, the question whether the legal estate is still in the trustees is one of more difficulty.

The power given to the trustees is to "sell any and all real estate, of which the trust premises shall be at any time composed" and the power given to the trustees with reference to investments is in much the same terms, to wit: "to invest, reinvest, and change any and all property of which the trust premises shall be at any time composed." Powers of sale of

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real property given by will to trustees usually end when the trust ends, but if it affirmatively appears that it was the intention of the testator that the trustees should have a power of sale after the trust in other respects has terminated, such powers may be exercised after the termination of the trust. The trust in this case cannot be held to be a trust for the sale of the trust property after the death of Mrs. Eldredge, as distinguished from a trust with a power in the trustees to sell. We are unable to find any clear indication in the will that after the death of Mrs. Eldredge the testator intended that the trustees should have power to sell the real property. It might be argued with more force that the testator intended to give the trustees power to make partition, but the existence of a power in the trustees to make partition has not been contended for by any of the parties to the suit, and a power to make partition does not authorize a sale. Sugden, Powers, (8th ed.) 856. See *How* v. *Waldron*, 98 Mass. 281; *Phelps* v. *Harris*, 101 U. S. 370.

If Mrs. Eldredge died leaving issue surviving her, then the testator gave the trust premises "to her issue, equally to be divided between and among them," etc. If she died leaving no issue surviving her, then the will provides that "the trust premises shall, at her decease, be divided into two equal parts or portions, one of which parts shall go to and be held by the said John T. Heard and his heirs in fee forever, and the other part shall be divided among my heirs at law, as though I died intestate." This language does not indicate that the testator intended that the real estate after Mrs. Eldredge's death should be converted into money by the trustees, and the money paid to the persons entitled to it. It rather indicates that the trust premises, so far as they consisted of real estate, should specifically go in fee simple either to the issue of Mrs. Eldredge or to John T. Heard and the testator's heirs at law, to be divided as directed by the will.

We are of opinion that the power to sell real estate was given for the purpose of changing investments of the trust property, and of performing the duties of the trust, and that when the trust terminated by the death of Mrs. Eldredge this power ceased to exist, and that the trustees have now no power under the will to sell the real estate for the purpose of dividing the

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proceeds. It is not contended that, if the will does not give the power to the trustees, the court can give it on the facts appearing in the case; and that question has not been considered. *In re Tweedie*, 27 Ch. D. 315. *In re Cotton*, 19 Ch. D. 624. *Peters* v. *Lewes & East Grinstead Railway*, 18 Ch. D. 429. *Wolley* v. *Jenkins*, 23 Beav. 53. Lewin, Trusts, (9th ed.) 681, 682. *Allen* v. *Dean*, 148 Mass. 594.

Whether the persons interested have a remedy in the Probate Court under St. 1898, c. 65, has also not been considered.

Decree accordingly.

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CORDELIA A. SILSBEE *vs.* PARKER J. WEBBER.

Essex. March 3, 1898. — June 2, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Duress — Conveyance by Woman through Fear of Effect on Husband's Health of threatened Disclosure — Ratification — Law and Fact.

A woman's son had been accused of stealing his employer's money, had made a confession, and agreed to give security for a certain sum. Upon the employer, with whom she previously had talked about her husband's condition, saying that he should have to tell her husband, who at that time was melancholy, very irritable, and unable to sleep, she said, "Don't do that, you know what his condition is"; and fearing that, if her husband was told of his son's crime, the knowledge would make him insane, in order to prevent the employer from doing so, she executed to him an assignment of her share in her father's estate, under which he collected the money. *Held*, in an action by her to recover it, that it could not be said that the jury would not be warranted in finding that the assignment was obtained by duress. FIELD, C. J., KNOWLTON & LATHROP, JJ., dissenting.

An act done under duress, which is formally valid, may be ratified when the restraint is removed, and the question of ratification is for the jury.

CONTRACT, to recover $1,150, alleged to have been obtained by duress. Trial in the Superior Court, before *Lilley*, J., who ruled that the action could not be maintained; directed the jury to return a verdict for the defendant; and, at the request of the parties, reported the case for the consideration of this court. If the ruling was right, judgment was to be entered on the verdict;

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otherwise, the verdict was to be set aside, and the case to stand for trial. The facts appear in the opinion.

The case was submitted on briefs to all the justices.

J. H. Sisk, for the plaintiff.

W. H. Niles & G. J. Carr, for the defendant.

HOLMES, J. This is an action to recover money alleged to have been got from the plaintiff by duress. In the court below a verdict was directed for the defendant, and the case was reported. The plaintiff's son had been in the defendant's employ, had been accused by him of stealing the defendant's money, had signed a confession, whether freely or under duress is not material, and had agreed to give security for $1,500. There was a meeting between the plaintiff and the defendant, in the course of which, as the plaintiff testified, the defendant said he should have to tell the young man's father, the plaintiff's husband. At that time, according to her, her husband had trouble in his head, was melancholy, very irritable, and unable to sleep, so that she feared that if he were told the knowledge would make him insane. The plaintiff further testified that she previously had talked with the defendant about her husband's condition, and that she begged him not to tell her husband, and told him that he knew what her husband's condition was, but that he twice threatened to do it in the course of his inquiries as to what property she had, and that to prevent his doing so she the next day went by agreement to the office of the defendant's lawyer, and executed an assignment of her share in her father's estate. Her son was present, and, as he says, protested that this was extortion and blood money. It is under this assignment that the money sued for was collected. In the opinion of a majority of the court, if the evidence above stated was believed, we cannot say that the jury would not have been warranted in finding that the defendant obtained, and knew that he was obtaining, the assignment from the plaintiff solely by inspiring the plaintiff with fear of what he threatened to do; that the ground for her fear was, and was known to be, her expectation of serious effects upon her husband's health if the defendant did as he threatened; and that the fear was reasonable, and a sufficiently powerful motive naturally to overcome self-interest, and therefore that the plaintiff had a right to avoid her act. *Harris*

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v. *Carmody*, 131 Mass. 51, 53, 54. *Morse* v. *Woodworth*, 155 Mass. 233, 250.

It is true that it has been said that the duress must be such as would overcome a person of ordinary courage. We need not consider whether, if the plaintiff reasonably entertained her alleged belief, the well grounded apprehension of a husband's insanity is something which a wife ought to endure rather than to part with any money, since we are of opinion that the dictum referred to, if taken literally, is an attempt to apply an external standard of conduct in the wrong place. If a party obtains a contract by creating a motive from which the other party ought to be free, and which in fact is and is known to be sufficient to produce the result, it does not matter that the motive would not have prevailed with a differently constituted person, whether the motive be a fraudulently created belief or an unlawfully created fear. Even in torts, the especial sphere of external standards, if it is shown that in fact the defendant by reason of superior insight contemplated a result which the man of ordinary prudence would not have foreseen, he is answerable for it; and in dealing with contributory negligence, the personal limitations of the plaintiff, as a child, a blind man, or a foreigner unused to our ways, always are taken into account. Late American writers repudiate the notion of a general external measure for duress, and we agree with them. Clark, Contracts, 357. Bishop, Contracts, (ed. 1887,) § 719. See *James* v. *Roberts*, 18 Ohio, 548, 562; *Eadie* v. *Slimmon*, 26 N. Y. 9, 12.

The strongest objection to holding the defendant's alleged action illegal duress is, that, if he had done what he threatened, it would not have been an actionable wrong. In general, duress going to motives consists in the threat of illegal acts. Ordinarily, what you may do without liability you may threaten to do without liability. See *Vegelahn* v. *Guntner*, 167 Mass. 92, 107; *Allen* v. *Flood*, [1898] A. C. 1, 129, 165. But this is not a question of liability for threats as a cause of action, and we may leave undecided the question whether, apart from special justification deliberately and with foresight of the consequences, to tell a man what you believe will drive him mad is actionable if it has the expected effect. *Spade* v. *Lynn & Boston Railroad*, 168 Mass. 285, 290. *White* v. *Sander*, 168 Mass. 296. If it

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should be held not to be, contrary to the intimations in the cases cited, it would be only on the ground that a different rule was unsafe in the practical administration of justice. If the law were an ideally perfect instrument, it would give damages for such a case as readily as for a battery. When it comes to the collateral question of obtaining a contract by threats, it does not follow that, because you cannot be made to answer for the act, you may use the threat. In the case of the threat there are no difficulties of proof, and the relation of cause and effect is as easily shown as when the threat is of an assault. If a contract is extorted by brutal and wicked means, and a means which owes its immunity, if it have immunity, solely to the law's distrust of its own powers of investigation, in our opinion the contract may be avoided by the party to whom the undue influence has been applied. Some of the cases go further, and allow to be avoided contracts obtained by the threat of unquestionably lawful acts. *Morse* v. *Woodworth*, 155 Mass. 233, 251. *Adams* v. *Irving National Bank*, 116 N. Y. 606. *Williams* v. *Bayley*, L. R. 1 H. L. 200, 210.

In the case at bar there are strong grounds for arguing that the plaintiff was not led to make the assignment by the duress alleged. They are to be found in the fact that the plaintiff sought the defendant; in her testimony that, when she made the assignment, she wanted the defendant to have full security for all her son owed him; and in the plaintiff's later conduct; — but we are considering whether there was a case of duress for the jury.

The assignment was on October 10, 1894. Before March 12, 1895, the plaintiff had joined with her sisters in employing a lawyer to secure her share in her father's estate, intending it to be paid over to the defendant. On March 12, 1895, to the same end, she signed a petition for distribution, setting forth the assignment, and afterwards took some further steps, and never made any claim that the assignment was not valid until December 19, 1895, before which time it had come to the knowledge of her husband. Apart from the weight which these facts may give to the argument that the plaintiff did not act under duress, they found an independent one, that if she did act under duress she has ratified her act. The assignment was formally valid. The only objection to it, if any, was the motive for it. *Fair-*

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banks v. *Snow*, 145 Mass. 153, 154. Therefore it might be ratified by the plaintiff when she was free. But the acts relied on were done in connection with a member of the bar, who had been the defendant's lawyer before he undertook to act for the plaintiff, and who plainly appeared to be acting for the plaintiff only in the defendant's interest. We cannot say that the jury might not find that the later acts of the plaintiff, if not done under the active influence of her supposed original fear, at least were done before the plaintiff had gained an independent foothold, or realized her independence of her rights. We are of opinion that the case should have been left to the jury. *Adams* v. *Irving National Bank*, 116 N. Y. 606, 614, 615.

Verdict set aside, and case to stand for trial.

KNOWLTON, J. The report shows no evidence which seems to me to warrant a finding for the plaintiff. It is not contended that she can prevail in this action on the ground that the parties agreed to compound a felony.

The defendant had detected his trusted clerk in embezzling from him. He could not certainly know how long the embezzlement had been going on, or how much money had been taken, but very likely he thought that it had been for a long time, and that the amount was large. The clerk had been in his employment for six years as chief salesman. It was proper that the defendant should obtain reimbursement if he could.

On account of what her son said, the plaintiff visited the defendant at his home. She testified that she wanted him to have full security for all her son owed him, and for anything he had stolen, and that she told the defendant so. She says she understood that her son had agreed to give security for the $1,500 which he admitted that he had stolen.

In all the defendant's dealings with the plaintiff there is not a suggestion that he made a threat, unless it be called a threat to say, when she proposed to give him a chamber set as security, "I do not think that will do, I will have to tell his father"; and to say again once or twice, before the interview ended, that he would tell her husband about the matter. Ordinarily, it would be right and proper for the defendant, if not his duty, to tell the young man's father what had happened.

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In 2 Greenleaf on Evidence, at section 301, is this clause: "By duress, in its more extended sense, is meant that degree of severity, either threatened and impending or actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness. . . . Duress *per minas* is restricted to fear of loss of life, or of mayhem, or loss of limb; or, in other words, to remediless harm to the person. If, therefore, duress *per minas* is pleaded in bar of an action upon a deed, the plea must state a threat of death, or mayhem, or loss of limb. . . . A fear of mere battery, or of destruction of property, is not, technically, duress, and therefore is not pleadable in bar." Bishop, in his work on Contracts, at section 715, defines duress as "any unlawful physical force, applied or threatened to the person of the party, or of the party's husband, wife, parent, or child, through constraint of which he, in form, consents to what he otherwise would not."

While the law in regard to duress *per minas* in some of the late cases is less strict than that stated by Greenleaf, in none of them, so far as I am aware, is this ground of avoiding a contract changed in its general character, or in the principles on which it is founded. The distinction still remains between threats of grievous injury, and legitimate arguments founded on disclosed intentions of the party using the arguments as to his lawful conduct affecting the other party. The word "threat" implies intentional detriment. The fundamental reason for depriving one of the benefits of his contract in such cases is that he was guilty of a wrong in obtaining it, and that his wrong was injurious to the other party in inducing the making of it. No contract can be set aside on the ground of duress *per minas* without the concurrence of these conditions. It is not enough to set aside a contract that the maker of it yielded to motives founded on legitimate arguments, even though the inducements rested in part upon statements by the other party of what would be done if the contract should not be made. It must be shown that the will is overcome by an improper and wrongful influence, producing fear which he has not sufficient strength to withstand. If the other party to the contract is innocent, his defence cannot prevail. *Fairbanks* v. *Snow*, 145 Mass. 153. The cases in which it is held, in this jurisdiction and elsewhere, that one

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whose will is overcome, and who is induced to execute a contract by threats of prosecution and imprisonment for a crime, made by one who reasonably believes him to be guilty of the crime, may avoid the contract on the ground of duress, rest upon the principle that it is an abuse of process, and a misuse of the machinery of the law, which the law will not permit, to extort the collection of a private debt, or to procure any other private benefit by proceedings intended only to impose punishment in the interest of the public. It is equally a wrong and an injury to accomplish the same result through threats of such an abuse of process. *Morse* v. *Woodworth*, 155 Mass. 233, 250.

The burden of proof is on the plaintiff to show that the defendant obtained the contracts by threatening to inflict injury upon her husband. A fair interpretation of the evidence indicates that the defendant's reference to her husband was in no sense a threat, but merely a natural statement, when the plaintiff offered inadequate security, that he should see whether the young man's father, who was an owner of houses and lands, was willing to furnish the security which his son had promised. If it was more than that, and was also a legitimate appeal to a motive which the plaintiff might have had to save her husband from the grief and sorrow that knowledge of the facts would be likely to bring to him, or to save herself from additional pain in sharing her husband's trouble, it would hardly be contended that the contracts would thereby be rendered voidable. A party endeavoring to obtain a contract from another may legitimately appeal to all proper motives which will induce the other to agree to his terms.

The only element in this case, as it seems to me, on which a doubt in regard to the proper decision of it can arise, is the testimony as to the condition of the plaintiff's husband. The plaintiff's testimony on this point was as follows: "He was suffering with a mental trouble, which made him very irritable. He suffered pain continually in the head, was melancholy and was unable to sleep. . . . He was attending to his business at the time of the trouble with Webber. He had various estates about town, and was collecting the rents, and looking after his business every day." There was testimony from other members of the plaintiff's family in regard to the husband's condition, but none more

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favorable to her than this. They all agreed that he was collecting his rents, taking charge of repairs, and attending to his business generally at the time when the contracts were made. She testified that she believed that knowledge of the charges against her son would make her husband insane; but there is not a word of testimony to show that the defendant knew of this belief if she entertained it. She testified that she had previously talked with the defendant about her husband's condition; but this must mean that she spoke about his condition as it was, and not about her belief that this information would make him insane, which, so far as appears, was never disclosed until the trial. In connection with the making of the contracts there was no conversation about her husband's condition except a reference to it when the plaintiff said, in answer to the defendant's statement that he should have to tell him, "Don't do that, you know what his condition is."

It is a familiar rule of law that fraud, or wrong of any kind, is never to be presumed. It cannot be inferred from evidence which is as consistent with right as with wrong. I can see nothing in the evidence that tends to show that the defendant was guilty of any wrong towards the plaintiff. What he proposed could do no direct harm to the person or property of the plaintiff or of her husband. At most, there was merely a possibility or a probability of suffering and harm from reflection upon facts for whose existence the defendant was not responsible, and which the husband would be likely to learn at some time from others if the defendant did not tell him. But this probability, viewed from the defendant's knowledge and information, was no greater than would be expected in the case of any man who was irritable, melancholy, and unable to sleep from trouble in his head, yet whose ailments were not so severe as to prevent him from managing a somewhat extensive and important business. Reading the testimony without favor or prejudice, I do not see how an imputation against the defendant of an improper purpose in saying to the plaintiff that he should have to tell her husband can be founded on anything more than conjecture. The presumptions are in favor of honesty and fair dealing, and the testimony is to be interpreted accordingly.

Moreover, there is nothing to show a belief on the part of the

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defendant that the statement that he should tell her husband would overcome the plaintiff's will. Upon his understanding of the facts, such a suggestion would not be expected to overcome the will of a person of ordinary firmness, and there is no evidence that she was supposed by him to be, or that she was in fact, less firm than other women. Whether the rule so often stated in the books, that to avoid a contract on the ground of duress by threats, a threat must be such as would overcome the will of a person of ordinary firmness, be of universal application or not, it undoubtedly furnishes a correct guide in cases in which there is nothing to show that the party who seeks to avoid the contract was not of ordinary courage and firmness.

Upon an extended examination of the authorities I have found no case in which a contract has been set aside on the ground of duress on such evidence as appears in this case. I think that the ruling of the Superior Court was correct.

The Chief Justice and Mr. Justice LATHROP concur in this dissent.

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WILLIAM T. FORBES, Judge of Probate, *vs.* LEONARD HARRINGTON & another.

Worcester. October 7, 1897. — June 7, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Liability of Heirs, Devisees, etc., after Settlement of an Estate — Statute — Master's Report — Evidence as to Settlement of Estate — Sureties on First Bond not Discharged by Filing of Second Bond.

The words "the settlement of an estate," in Pub. Sts. c. 136, § 26, mean such an actual settlement of it that the plaintiff could not have obtained full satisfaction of his claim against the estate under the preceding provisions of the chapter by any proceeding against the executor or administrator if he had used the diligence which the statutes require. But if none of the remedies under the preceding provisions of the chapter were open to him, or would have enabled him to recover his claim in full, and he has used due diligence, then his remedy to recover what is due is under § 26 and the following sections, to the extent of the real or personal property that have been received by the heirs, next of kin, devisees, and legatees; and in order to proceed under this section it is not necessary that the settlement of the estate by an administrator or executor should

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formally appear in the records of the Probate Court, but, if an executor or administrator has been properly appointed and qualified, and has given notice of his appointment, the fact that the estate has been fully administered or has been actually settled may be shown by any competent evidence.

Where a master reports that the only evidence showing any property personal or real that ever came into the hands of L., executor of the estate of S., was the inventory filed in the Probate Court, which showed no personal estate, the plaintiff's exceptions thereto, on the ground that the master did not find that no personal property ever came into the hands of L. as executor of the will of S., and, the time having expired for bringing actions against the executor, did not find that the estate was settled within the meaning of Pub. Sts. c. 136, § 26, but found that the estate "still remains unsettled," must be sustained; and, unless the parties desire to offer evidence on the subject, it should be found and ruled that the estate has been settled within the meaning of Pub. Sts. c. 136, §§ 26 *et seq.*

The sureties on the first bond of a guardian are not discharged by the filing of a second voluntary bond.

BILL IN EQUITY, brought under Pub. Sts. c. 136, §§ 26 *et seq.*, to reach real estate of Samuel P. Harrington, a deceased surety on a probate bond, in the possession of Leonard Harrington, devisee for life, and of William T. Harrington, devisee in remainder.

Hearing before *Holmes*, J., who entered a decree dismissing the bill, and, the plaintiff having appealed, reported the case for the determination of the full court.

T. G. Kent, for the plaintiff.

W. B. Harding, for the defendants.

FIELD, C. J. The justice of this court by whom this suit was heard and reported found that the right of the plaintiff to recover has been established "except so far as the contrary appears in this report," and he ruled that there had been no settlement of the estate of Samuel P. Harrington within the meaning of Pub. Sts. c. 136, §§ 26 *et seq.*, and entered a decree dismissing the bill, from which the plaintiff appealed.

Samuel P. Harrington died on February 23, 1887, leaving a will which was duly admitted to probate on March 22, 1887, in which he devised to Leonard Harrington, Fred L. Harrington, and William T. Harrington certain interests in real estate which he owned in Worcester in this Commonwealth. Leonard Harrington was appointed executor, and gave a bond as such, without sureties, on March 22, 1887, and on the same day letters testamentary were issued to him. On April 17, 1888, Leonard Harrington filed his affidavit that he had given due notice of his

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appointment as executor, and on the same day filed an inventory of the estate of said testator. The inventory shows real estate of the estimated value of $36,000, but no personal property. The records of the Probate Court show no further proceedings in the settlement of the estate. There was no evidence before the master that any personal property belonging to the estate of Samuel P. Harrington ever came into the hands of Leonard Harrington as executor, or that any suit ever had been brought against the estate. The report of the justice of this court recites that the master's report "does not show any evidence" of any debts against the estate.

The present bill was brought, under Pub. Sts. c. 136, §§ 26 *et seq.*, against Leonard Harrington and William T. Harrington as devisees of Samuel P. Harrington, Fred L. Harrington not being resident within this Commonwealth, and not being within reach of the process of the court. The bill was brought upon a probate bond given on December 10, 1884, in the penal sum of $21,000, by Charles I. Rawson, guardian of William F. Hervey, an insane person, as principal, and said Samuel P. Harrington, with others, as sureties. Rawson was on March 7, 1894, removed by the Probate Court from such guardianship, and Francis H. Dewey was appointed guardian in his place. Rawson as such guardian filed his final account in the Probate Court on June 26, 1894, and after a hearing he was charged with a balance of $14,467.14, and on appeal to the Supreme Judicial Court the amount for which he was held chargeable was by a decree entered in that court on November 27, 1894, determined to be $8,821.14. A copy of this decree was filed in the Probate Court on December 6, 1894. Although a demand was made upon Rawson for the payment of this sum, it was not paid.

The present bill in equity was inserted in a writ dated December 24, 1894, which was within one year after the right of action accrued to the plaintiff, and the time had long before expired within which an action could be commenced against the executor of the estate of Samuel P. Harrington. Leonard Harrington has been and still is in possession of the real estate devised to him for life by the will of Samuel P. Harrington, and has collected the rents and profits.

It is at least doubtful whether the claim of the plaintiff could

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have been legally presented to the Probate Court under Pub. Sts. c. 136, § 13, until it had accrued. Our decisions indicate, although the exact question has not been decided, that the possible liability of a surety on a probate bond for a breach of his principal which has not been ascertained or may not have occurred is not a claim that "is or may become justly due" within the meaning of that section, until it has been definitely established. *Bullard* v. *Moor*, 158 Mass. 418. *Ames* v. *Ames*, 128 Mass. 277. It would be difficult, if not impossible, for a Probate Court on an application under that section to determine whether there might not be breaches of a probate bond in the future, or whether there may not have occurred breaches in the past, unless some action determining this fact had been taken in the estate in which the bond was given. Two years from the date of the bond given by Leonard Harrington as executor expired on March 22, 1889, and the liability as surety of Samuel P. Harrington on the bond given by Rawson as guardian was not finally determined until November 27, 1894. The only possible reason, therefore, why the plaintiff cannot maintain this suit, as the presiding justice of this court has found, is that there has been no settlement of the estate of Samuel P. Harrington by the executor, within the meaning of Pub. Sts. c. 136, §§ 26 *et seq.*, or that a second bond given by Rawson as guardian after the death of Samuel P. Harrington was a substitute for the first bond given by him. If the meaning of the Pub. Sts. c. 136, § 26, is that there must be a formal settlement of the estate of Samuel P. Harrington in the Probate Court by the rendering of a final account and the adjudication of the Probate Court thereon showing of record a settlement of the estate, then there has been no settlement of the estate, and the plaintiff cannot maintain this suit. Leonard Harrington as devisee of the real estate is interested in not rendering any such final account, and, if on being required to do so he had refused, one incidental question is what would be the remedy. The usual remedy would be by a suit on his bond as executor, in which judgment would be rendered for the penal sum of the bond, and execution would issue for what is equitably due. If in such a suit he or the sureties on his bond proved that there was no personal property of the estate of Samuel P. Harrington which came or could have come into his hands as

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executor, and that it was not his duty as executor to sell the real estate, the execution would issue for only nominal damages. Is the bringing of such a suit, and the recovery of judgment and the issuing of an execution for nominal damages, a settlement of the estate within the meaning of Pub. Sts. c. 136, § 26?

So far as we are aware, it never has been decided, although it may perhaps be true that, if an executor, administrator, or guardian refuses to obey an order of the Probate Court requiring him to render an account, he may be adjudged in contempt, and committed to jail until he shall comply with the order. Would committing an executor to jail on his refusal to render a final account be a settlement of the estate, within the meaning of Pub. Sts. c. 136, § 26? It also has been intimated but never decided that a final account may be taken, although an executor persists in his refusal to render such an account, in much the same manner as an account in equity is taken when a defendant refuses to appear and the bill is taken for confessed against him. See *Murray* v. *Wood*, 144 Mass. 195. Is the taking of an account in this manner a settlement of the estate within the meaning of the statute? Can an executor who is also a devisee in such a case as the present escape all liability as devisee by simply refusing to render a final account in the Probate Court, and persisting in his refusal until a year has expired from the time when the cause of action of the plaintiff accrued?

The general scheme of our statutes for the recovery by creditors of debts against the estate of a deceased person is intelligible enough. In general, heirs, devisees, next of kin, and legatees are not to receive and hold any part of the estate unless the debts are paid. When an estate is not represented as insolvent, the creditors must bring suit against an executor or administrator after one year and within two years from the time of giving his bond, if due notice of his appointment has been given. Certain exceptions to this requirement are found in Pub. Sts. c. 136, §§ 10–12, which are not applicable to the present case. After one year from his giving bond an executor who has given due notice of his appointment may safely proceed to pay the debts of the estate, if he has received no notice of the existence of demands which authorize him to represent it insolvent. An application under Pub. Sts. c. 136, § 13, may be made, "at any time before

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the estate is fully administered" for the retention of sufficient assets to satisfy claims which do not accrue within two years from the time of giving the administration bond, unless some person interested will give a bond to satisfy such claim if it is proved to be due, and an action may be brought within one year after the claim becomes payable, or within one year after the final determination of the proceedings on appeal, against the executor or administrator, if they are ordered to retain assets, or upon the special bond, if one is given. The section probably relates only to the retention of personal assets. *Clark* v. *Holbrook*, 146 Mass. 366. Under this section, in order to defeat the application, can an administrator or executor show that in fact no personal estate has come into his hands, or that he has paid it out to the persons entitled to it according to law before the application was made? An order requiring an executor to retain in his hands a certain amount of the personal assets of course would be unavailing if there were no such assets. An estate in fact is often fully administered although the record of it may not appear in the Probate Court, and as the record of the Probate Court shows only what has been done, even when the final account as rendered is approved, the action approved necessarily must have taken place some time before the approval of it by the court. *Lincoln* v. *Aldrich*, 141 Mass. 342.

The general purpose of our statutes is that the settlement of the estates of deceased persons should not be unnecessarily delayed, and the general purpose of Pub. Sts. c. 136, §§ 26 *et seq.*, is that, if a person from the nature of his claim against the estate has had no opportunity of fully enforcing it against the estate in the hands of the executor or administrator by any of the methods thereinbefore provided, he should have an opportunity of recovering what is due to him from the heirs and next of kin if the estate was intestate, or from the devisees and legatees of a testate estate to an amount not exceeding the value of the real or personal property that had been received from the estate, but the action must be commenced within one year after the right of action accrued. In such a case as the present, the executor could not have been licensed to sell real estate in order to pay the present claim. *Tarbell* v. *Parker*, 106 Mass. 347. *Ames* v. *Jackson*, 115 Mass. 508.

Brooks v. *Raynor*, 127 Mass. 268, in some respects resembles

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the case at bar. In that case, however, the defendant demurred to the bill, and the bill alleged, among other things, that the executor of the estate of Lilley Eaton, who was one of the sureties on a guardian's bond, "still holds a large portion and nearly all of the property of the testator, more than sufficient to satisfy the plaintiff's claim," and it was held that the plaintiff's remedy was under Gen. Sts. c. 97, § 8, which is now, after amendment by St. 1879, c. 71, Pub. Sts. c. 136, § 13. The estate of the testator had not been in fact fully administered, and there was apparently an adequate remedy under that section. Of that section in the Public Statutes the court in *Clark* v. *Holbrook*, *ubi supra*, say, "That section looks to the executor's retaining assets already in his hands. It does not contemplate the court's ordering him to sell real estate to meet the liability when it shall accrue. Still less does it contemplate such a sale to meet the chance of a liability which may never be incurred. Therefore it is not intended to bar a resort to the real estate in case the personal estate is retained and exhausted."

Grow v. *Dobbins*, 124 Mass. 560, was an action at law, and it is said in the opinion that "the plaintiff did not allege or prove that the estate of the intestate had been settled when his right of action accrued. If it had not, the plaintiff had a remedy under the Gen. Sts. c. 97, §§ 8, 9," etc. But if there were no personal assets in fact in the hands of the administrator, either because none had been received or because all the assets in his hands had been lawfully paid to the persons entitled to them, it is difficult to see what remedy the plaintiff had under these sections of the statutes. In that case the court below ruled that the action could not be maintained, for the reason that the plaintiff's remedy was by bill in equity, and because the evidence did not show the case to be within the statute. The plaintiff accordingly brought a bill in equity. *Grow* v. *Dobbins*, 128 Mass. 271, was the bill in equity, but the bill did not allege that the estate of William Dobbins had either been fully administered or settled; the answer alleged that the estate of William Dobbins "was not fully administered." A single justice dismissed the bill, on the ground "that it did not allege, nor did it appear at the hearing, that the estate had been settled when the bill was filed." On this ground the exceptions were overruled. In none of these cases is it con-

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sidered or determined what constitutes a settlement of an estate, within the meaning of Pub. Sts. c. 136, §§ 26 *et seq.* See also *Hammond* v. *Granger*, 131 Mass. 351. *Allen* v. *Dean*, 148 Mass. 594, relates to the construction of a will.

The meaning of the words "after the settlement of an estate," etc., in the first part of § 26, chapter 136, of the Public Statutes, must be construed with reference to other provisions in the same chapter, and to other clauses in the same or the following sections, as has been noticed in *Clark* v. *Holbrook*, *ubi supra*. The history of the section shows that the words were first used in the Revised Statutes. Gen. Sts. c. 101, § 31, Rev. Sts. c. 70, § 13, and the Commissioners' Notes. St. 1788, c. 66, § 5. The debts for which the heirs, next of kin, devisees, or legatees are to be held liable are declared in said § 26 to be "all debts for which suits could not have been brought against an executor or administrator, and for which provision is not made in the preceding provisions of this chapter." The beginning of § 27 is as follows: "A creditor whose right of action accrues after the expiration of said time of limitation, and whose claim could not legally be presented to the Probate Court, or whose claim, if presented, has not been allowed, may, by action commenced within one year next after the time when such right of action accrues, recover," etc. The reference to a claim which could not legally be presented to the Probate Court, or, if presented, has not been allowed, plainly refers to § 13 of the same chapter. It would unnecessarily delay the settlement of estates to hold that the Probate Court could order an executor or administrator to retain personal assets to the amount of the penal sums of all the probate bonds on which the deceased was a surety when it had not been determined that there had been a breach of the condition of the bonds. But if application could be made under that section, it might be that the executor or administrator never had received any personal assets, or, if he had, had paid them out to the persons entitled to them, perhaps in payment of preferred debts; or that all the personal assets which came into his hands, or were in his hands at the time when the application was made, were insufficient in amount for the ultimate satisfaction of the claim presented.

We think that the words "the settlement of an estate," in

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Pub. Sts. c. 136, § 26, mean such an actual settlement of it that the plaintiff could not have obtained full satisfaction of his claim against the estate under the preceding provisions of the chapter by any proceeding against the executor or administrator if he had used the diligence which the statutes require. But if none of the remedies under the preceding provisions of the chapter were open to him, or would have enabled him to recover his claim in full, and he has used due diligence, we think that then his remedy to recover what is due is under § 26 and the following sections, to the extent of the real or personal property that has been received by the heirs, next of kin, devisees, and legatees; and that in order to proceed under this section it is not necessary that the settlement of the estate by an administrator or executor should formally appear in the records of the Probate Court, but that, if an executor or administrator has been properly appointed and qualified, and has given notice of his appointment, the fact that the estate has been fully administered or has been actually settled may be shown by any competent evidence. Pub. Sts. c. 136, § 26, in terms requires only a settlement of the estate, and not that the settlement should appear of record in the Probate Court.

We are of opinion that the ruling of the presiding justice was erroneous on this part of the case, because, as we infer, it proceeded on the theory that a final settlement of the estate of record in the Probate Court was necessary as a condition precedent to the maintenance of the suit.

The plaintiff's counsel filed objections and exceptions to the master's report, on the ground that the master did not find that no personal property ever came into the hands of Leonard Harrington as executor of the will of Samuel P. Harrington, and did not find that said estate was settled within the meaning of Pub. Sts. c. 136, § 26, but found, if under the rule of reference to him he had the power so to find, that the estate "still remains unsettled"; and he requested the master to report all the evidence on the subject, including the inventory filed by said Harrington. The master reported: "The only evidence before me showing any property, personal or real, that ever came into the hands of Leonard Harrington, executor of the estate of Samuel P. Harrington, was the inventory filed in the Probate

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Court, a copy of which is hereto annexed," and the inventory annexed showed no personal estate. We think that the plaintiff's exceptions to the master's report should be sustained, and that, unless the parties desire to offer further evidence on this subject, it should be found and ruled that the estate of Samuel P. Harrington has been settled, within the meaning of Pub. Sts. c. 136, §§ 26 *et seq.*

The next question relates to the effect of the filing of a second bond by Rawson as guardian, after the death of Samuel P. Harrington. The provisions of statute on this subject are found in Pub. Sts. c. 143, §§ 5–8. It does not appear that the second bond was filed in pursuance of these provisions of statute, and on the evidence reported by the master it must be found to be a voluntary bond, and it must be held that the sureties on the first bond were not discharged by the filing of the second bond. *Brooks* v. *Whitmore*, 142 Mass. 399. *Loring* v. *Baker*, 3 Cush. 465.

The decree dismissing the bill should be reversed, and unless the parties desire to offer further evidence on the questions whether any personal assets ever came into the hands of the executor of the will of Samuel P. Harrington, or whether at the time when the plaintiff's cause of action accrued there were personal assets in the hands of the executor which he might have been ordered to retain under Pub. Sts. c. 136, § 13, there should be a decree for the plaintiff. *Ordered accordingly.*

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DAVID FLYNN *vs.* BOSTON ELECTRIC LIGHT COMPANY.

Suffolk. March 2, 1898. — June 21, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Employers' Liability Act — Superintendence — Fellow Servant — Expert — Testimony.

The plaintiff, a lineman in the defendant's employ, while engaged in stringing an overhead electric light wire which ran through and was obstructed by the branches of a tree, was ordered by one G., who was the foreman of the gang at work upon the wire, and who was accustomed to assist the men under him by performing various acts of manual labor when occasion required it, to cut off a

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limb of the tree; and after the limb had been cut, G. gave orders to the other men upon the ground to pull the wire back through the tree, and himself took hold of the wire with some of the others and pulled it, and the wire caught upon the limb of the tree upon which the plaintiff was standing, and which seemed to the plaintiff to be sound, and before the plaintiff had time to get into a safe position the limb broke and he fell and was injured. *Held*, that G.'s act in pulling on the wire was not an act of superintendency within the meaning of the employers' liability act, St. 1887, c. 270, and that the defendant was not liable.

The work of stringing wires from one pole to another through branches of an intervening tree is one within the range of ordinary knowledge, experience, and observation; and it is not a matter as to which expert testimony will be admitted.

TORT, under the employers' liability act, St. 1887, c. 270, for personal injuries occasioned to the plaintiff while in the defendant's employ.

At the trial in the Superior Court, before *Hardy*, J., it appeared that the plaintiff, a lineman in the employ of the defendant, was engaged with five other men, all in the defendant's employ, stringing an overhead electric light wire which ran through the branches of a tree; that one Grant, who was the foreman of the gang, and who was accustomed to assist the men under him by performing various acts of manual labor when the occasion required it, ordered the plaintiff to cut off a limb of the tree which obstructed the wire; when cut, this limb lodged upon a lower limb, and the plaintiff, standing on the lower limb, made a second cut in the one which had fallen from above, and it fell to the ground; and the lower limb seemed to the plaintiff to be sound. After the upper limb fell to the ground the plaintiff remained standing on the lower limb with one leg around the trunk of the tree; and Grant then ordered the wire to be pulled back through the tree, and together with some of the other men began to pull upon it; when the wire was pulled it caught upon the limb, and the plaintiff called out to stop pulling, but before he had time to get into a safe position the limb broke and the plaintiff fell to the ground and was injured. For the purpose of showing that the method of doing the work under the direction of Grant was unsafe and unusual, and as bearing upon the plaintiff's due care, the plaintiff's counsel asked of an electrical expert whether in his opinion the method of dealing with the wire was a proper one; and he also asked of the same expert what was the usual method of running a wire

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from one pole to another when there was a tree between the poles. Both questions were excluded, and the plaintiff duly excepted.

At the close of the evidence the plaintiff requested the following ruling: "If the jury find that Grant gave negligent orders, when acting as superintendent, to the plaintiff or the other workmen, just preceding the injury of the plaintiff, orders not consistent with due care, — and that the giving of these orders caused the men handling the wire, which was then in contact with a part of the tree upon which the plaintiff was standing, to so handle and operate that wire that the plaintiff's position was rendered unsafe and dangerous, and the plaintiff was injured by reason of said orders of Grant being executed, — the jury would be authorized in finding that the negligence of Grant contributed to produce the injury of the plaintiff, even though after he, Grant, gave the orders, he went to work with his own hands to help pull the wire."

The judge refused so to rule, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

The case was argued at the bar in March, 1898, and afterwards was submitted on briefs to all the justices.

J. E. Cotter & A. P. French, for the plaintiff.

A. Hemenway, (*G. C. Dickson* with him,) for the defendant.

BARKER, J. Assuming that Grant's principal duty was that of superintendence, he was also a workman laboring with his own hands, and the defendant is not made answerable to the plaintiff for Grant's negligence except in the exercise of his superintendence. We are of the opinion that the evidence would not justify a finding that any negligence in his exercise of superintendence contributed to the plaintiff's injury.

A wire had been passed through the branches of a tree into which the plaintiff was sent to cut off a limb. When cut, this lodged upon another lower down, and then the plaintiff, standing upon the lower limb, made a second cut in the one which had fallen from above, and it fell to the ground. Assuming that it was his duty to remain longer in the tree, there is nothing to justify a finding that the order then given to pull the wire back was negligent.

The wire was not then caught, and the plaintiff was himself

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then in a position to see what would probably be the effect of pulling the wire back. This order is the only act of Grant which could be found to be an act of superintendence connected with the accident. His helping the other workmen to pull was merely the act of a workman, and had in it no element of superintendence. When the wire was pulled, it caught upon the limb, the limb shook, and the plaintiff then called out to stop pulling, but before he had time to get into a safe position the limb broke. It is plain that the plaintiff was in a position to know and to judge of his own safety, and if the pulling back of the wire, which was naturally the next thing in order after the limb which he had been sent into the tree to cut off had finally fallen, would put him in peril, he himself should give warning. Grant could not be found negligent in not perceiving the danger which the plaintiff himself did not perceive, and of which he did not give warning. When the danger became apparent, it was too late to avert the accident.

We also think that the refusal of the court to admit the opinion of an electrical expert as to whether the method of dealing with the wire was a proper one, and what the usual method is of running a wire from one pole to another when there is a tree between the poles, was correct. That the wire was intended for the transmission of electricity was immaterial.

The work of stringing wires from one pole to another through branches of an intervening tree is one within the range of ordinary intelligence and observation, involving only matters of ordinary knowledge and experience, such as men in general understand and comprehend without expert assistance, and as to which technical experience would not be instructive. See *Higgins* v. *Dewey*, 107 Mass. 494.

Exceptions overruled.

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MARY DOHERTY *vs.* ISAAC McLEAN.

Suffolk. March 7, 1898. — June 21, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Negligence — Law and Fact.

In an action for personal injuries there was evidence tending to show that the plaintiff, a girl twelve years of age, entered the carpenter shop of the defendant to purchase a basket of wood; that she paid five cents to one of the defendant's workmen, and entered a bin having a wall three feet high partly filled with wood, by a step which she had been in the habit of using whenever she bought wood at the shop, for the purpose of filling her basket; that while in the bin one of the defendant's men placed boards across the top of the bin so as to obstruct the plaintiff's access to the step by which she had entered the bin; that she left the bin by climbing over one of the other walls, near which was a table containing a revolving knife extending about a sixteenth of an inch above its surface, which in rapid motion might look as if it were at rest, and in so doing rested her hand upon the revolving knife and was injured; and that the way she got out seemed to the plaintiff the easiest after the boards were put on the bin. *Held*, that it could not be said, as matter of law, upon undisputed facts, that the plaintiff was careless, or that the defendant was free from fault in allowing her under such circumstances to get out by a way which exposed her to injury.

TORT, for personal injuries. At the trial in the Superior Court, before *Hardy*, J., there was evidence tending to show that the plaintiff, a girl twelve years of age, with her brother who was fifteen years of age, entered the defendant's carpenter shop to purchase a basket of wood, for which she paid five cents to one of the defendant's workmen; that she and others had bought wood at the plaintiff's shop on numerous occasions prior to the accident, and that the defendant's workman had placed the money received therefor in a drawer where change was kept with which to buy small supplies for the shop; that the plaintiff and her brother entered a bin about three feet high partly filled with wood, for the purpose of filling her basket, by a step which she had been in the habit of using whenever she had bought wood at the shop; that while they were in the bin a workman of the defendant placed some boards diagonally across the top of the bin obstructing the plaintiff's access to the step by which she entered it; that about eighteen inches from one side of the

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bin, parallel with it, and extending a large part of the length of the bin was a table, on which there was a revolving knife, projecting about a sixteenth of an inch above the surface thereof; that when in rapid motion the knife might look as if it were at rest; that the plaintiff left the bin by climbing over it at the corner next to this table, which seemed to her to be the best way to get out; and that in so doing she rested her hand on the knife, which she thought was a piece of iron at rest, and was injured. The defendant's evidence tended to show that he did not know that wood had been sold to the plaintiff or others by the basket; that he had given express orders to his foreman and workmen to sell no wood by the basket, and to allow no children in the shop; that the bin was easily accessible on a side other than that by which the plaintiff left it; and that it was impracticable to cover the knife because it was in such constant use.

The defendant requested that the following rulings be given:

"1. There is no evidence on the part of the plaintiff to show that she was anything more than a licensee at the most.

"2. There is no evidence sufficient to warrant the jury in finding that the plaintiff was in the exercise of due care when she was injured.

"3. There is no evidence sufficient to warrant the jury in finding that the defendant or his servants were negligent.

"4. Upon all the evidence in the case, the plaintiff is not entitled to recover."

The judge refused to give the first ruling, but gave the second, third, and fourth rulings, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

The case was argued at the bar in March, 1898, and afterwards was submitted on briefs to all the justices.

J. F. Wheeler & R. G. McClung, for the plaintiff.

W. F. Wharton, for the defendant.

ALLEN, J. The evidence would warrant a finding that the plaintiff was invited to come to the defendant's shop to buy waste wood, and, after having paid the price of a basketful, to enter the bin for the purpose of taking the wood; and that, having paid the price on the day of the accident, she was properly in the bin with her brother for the purpose of filling her basket. The evidence also tended to show that while there her usual

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way of getting out was cut off by the act of one of the defendant's workmen in placing boards across the bin, and thus covering the corner where there was a step or something which served for a step, which she was in the habit of using in getting into and out of the bin; and that therefore she took another way of getting out, and in doing this received the injury by placing her hand upon a revolving knife which projected about a sixteenth of an inch above the surface of a table standing near the bin. She testified that she thought this knife to be a still piece of iron, and there was other testimony that when in rapid motion it might look as if it was at rest. Whether the course which she took to get out of the bin was inconsistent with due care on her part was a question for the jury. Being without assistance, advice, or caution, it cannot be held, as matter of law, that upon undisputed facts she was careless, or that the defendant was free from fault in allowing her under such circumstances to get out by a way which exposed her to injury.

Exceptions sustained.

AUGUSTUS P. LORING & another, trustees, *vs.* MASSACHUSETTS HORTICULTURAL SOCIETY & others.

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Suffolk. March 25, 28, 1898. — June 21, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Trust Deed — Power of Appointment by Will — Time at which Appointees are entitled to be Paid — Interest.

On a bill in equity for instructions, brought by trustees under a trust deed of H., it appeared that the deed gave property in trust to the use of such persons and corporations as H. might appoint by will; that H. died on February 9, 1895, and by his will and codicil appointed legacies to different persons and corporations, and the residue to the M. Society; that the will and codicil were proved after a contest on May 17, 1897, and that then there was a contest whether the property was assets to be administered by H.'s executor, or was to be distributed by the plaintiffs, which was decided for the plaintiffs on January 25, 1898, and on February 5, 1898, the legacies other than the residue were paid. The words in the trust deed were "upon and after the death of said H. then in trust to hold

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the said trust property" to the use of the appointees, and "the trustees shall take such time, not exceeding three years from the death of H., as they may think best, for the most judicious conversion of the trust estate and to prevent the sacrifice thereof." *Held*, that the appointees were to be treated as if they had been entitled to be paid at H.'s death, and that they must be paid interest from that date.

BILL IN EQUITY, by the trustees under the trust deed of Francis B. Hayes, asking the instructions of the court as to the construction thereof. The case was reserved by *Barker*, J., on the bill, answers, and an agreed statement of facts, the material portions of which appear in the opinion.

The case was argued at the bar in March, 1898, and afterwards was submitted on briefs to all the justices.

J. B. Warner, for the Massachusetts Horticultural Society.

E. W. Hutchins, for the Berwick Academy.

A. Lord, for the executor of the will of Meta T. Pitts, a sister of the testator.

HOLMES, J. This is a bill for instructions by trustees under a trust deed of Francis B. Hayes. The deed gave certain property to the plaintiffs in trust to the use of such of certain persons and corporations as Hayes might appoint by will. Hayes died on February 9, 1895, and by his will and codicil appointed pecuniary legacies to different persons and corporations, and the residue to the Massachusetts Horticultural Society. The will and codicil were proved after a contest, on May 17, 1897. Then there was a contest whether the property was assets to be administered by Hayes's executor, or was to be distributed by the plaintiffs, which was decided for the plaintiffs on January 25, 1898, and on February 5, 1898, the legacies other than the residue were paid. The question is whether they are entitled to any, and, if any, what interest at the expense of the residue.

The first question raised by the bill, although hardly touched in the argument, is whether the appointment speaks from the death of Hayes or only from the probate of the will. Of course it speaks from no earlier date. *Marlborough* v. *Godolphin*, 2 Ves. Sen. 61, 78. It is very clear that the appointment must be by a valid will, and that the only way in which this court can know that a given instrument is a valid will is by its having been admitted to probate. "A will, without the probate, is of

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no avail." *Dublin* v. *Chadbourn*, 16 Mass. 433, 442. *Shumway* v. *Holbrook*, 1 Pick. 114. *Ross* v. *Ewer*, 3 Atk. 156, 160. *Ex parte Limehouse Board of Works*, 24 Ch. D. 177. An appointee by will has no rights until the will is proved, and hence it might be argued that for any purpose his rights could not be deemed to have an earlier beginning. We are of opinion, however, that generally appointments by will are intended to speak from the death of the testator, and not to leave a gap or intervening time during which the fund is simply to accumulate. In this case, at least, the express words are "upon and after the death of said Francis B. Hayes, then in trust to hold the said trust property" to the use of the appointees. Words could not state more clearly that the rights of the appointees were to begin with the death; and although literally they could not begin at that time, the creator of the trust was entitled to say, and did say by these words, that in determining what those rights were they should be treated as if they began then. Of course under such a trust and power as this, it was the right of the donee to fix any time for the beginning of interest that he saw fit, just as he might fix the rate. *Lewis* v. *Freke*, 2 Ves. Jr. 507, 512. *Balfour* v. *Cooper*, 23 Ch. D. 472, 477, 478.

We are of opinion, further, that the words which we have quoted are not overridden or made nugatory by the provision in the same deed that, in transferring the trust fund under the appointment or in default of it, "the trustees shall take such time, not exceeding three years from the death of said Francis B. Hayes, as they may think best, for the most judicious conversion of the trust estate and to prevent the sacrifice thereof." This provision suspends liability to action but goes no further. *Bartlett, petitioner*, 163 Mass. 509, 521.

As the appointees are to be treated as if they had been entitled to be paid at Hayes's death, we are of opinion that they must be paid interest from that date. Assuming that the delay of payment was justified, and within the permission given by the trust deed, that does not exonerate the estate from paying interest. It is not true here, as stated in *Crickett* v. *Dolby*, 3 Ves. 10, 13, and *Donovan* v. *Needham*, 9 Beav. 164, 167, that interest is to be given only for default of payment, or as stated in *Earle* v. *Bellingham*, 24 Beav. 448, 450, that it is payable

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only from the time the legacy is receivable. *Kent* v. *Dunham*, 106 Mass. 586, 590. When the delay is allowed only for the convenient and profitable management of the estate, interest is allowed from the usual date. *Bartlett, petitioner*, 163 Mass. 509, 521. Whenever allowed, it is allowed at the statute rate, although that is higher than that which trust funds usually earn in these days. *Welch* v. *Adams*, 152 Mass. 74, 88, 89. Interest has been allowed on testamentary appointments, (*Tatham* v. *Drummond*, 2 Hem. & M. 262, 268,) and whatever the scope of that decision, there is no rule in this Commonwealth that interest on such appointments does not begin to run for a year. The same would seem to be true of the law of New York and Pennsylvania. *Dixon* v. *Storm*, 5 Redf. 419. *Howell's estate*, 18 Penn. C. C. 257. *Decree accordingly.*

EMMA SMITH *vs.* ARIEL SMITH.

Middlesex. March 30, 1898. — June 21, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Statute — Power of Judge to declare Marriage void.

It is within the power of a judge of the Superior Court to enter a decree for a libellant, under Pub. Sts. c. 145, § 11, declaring the marriage void, where it appears that the libellant, soon after the ceremony and before the consummation of the marriage, on learning that the respondent was afflicted with a venereal disease, refused to live with and never did live with him, and the judge finds that he was constitutionally afflicted with syphilis, with which the libellant would become infected in case of cohabitation, and "that the disease would be transmitted to any offspring which they might have; that, while it was not absolutely incurable, the chances of a cure being effected in the state in which the respondent was were very remote and doubtful."

LIBEL, for a sentence of nullity of marriage. Trial before *Sheldon*, J., who ordered a decree of nullity to be entered, and reported the case for the determination of this court. If, on his findings, he had power to enter such decree, the same was to stand; otherwise, the libel was to be dismissed. The facts appear in the opinion.

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J. C. Burke & W. S. Marshall, (*J. F. Corbett* with them,) for the libellant.

No counsel appeared for the libellee.

KNOWLTON, J. This libel is brought under the Pub. Sts. c. 145, § 11, the first part of which is as follows; "When the validity of a marriage is doubted, either party may file a libel for annulling such marriage, or, when the validity of a marriage is denied or doubted by either party, the other party may file a libel for affirming the same." The omission of the words, "for fraud or other cause," contained in the Gen. Sts. c. 107, § 4, and in St. 1855, c. 27, does not change the meaning of the provision. The statute assumes that there may be marriages which are legal in form but invalid in fact. In terms it confers jurisdiction upon the court, but in reference to the law of marriage it is merely declaratory.

The facts of the present case are peculiar. On the day of the marriage, soon after the ceremony, the libellant received information that the respondent was afflicted with a venereal disease called syphilis. She communicated the information to her mother, who immediately charged him with being so afflicted. He denied the charge, but consented to an examination by a physician. An examination was made that disclosed the fact, which the presiding justice has found, that he was constitutionally afflicted with syphilis, a contagious disease with which the libellant would become infected in case of cohabitation, "thus seriously impairing her health, and involving consequences of the most grievous character." The judge also found "that the disease would be transmitted to any offspring which they might have; that, while it was not absolutely incurable, the chances of a cure being effected in the state in which the respondent was were very remote and doubtful." The libellant, on learning the libellee's condition, refused to live with him as his wife, and there has been no consummation of the marriage. The libellee, knowing his diseased condition, induced the libellant to contract the marriage without informing her in regard to it. She supposed him to be a man in good health and of good habits, and if she had known that he was suffering from such a disease she would not have contracted the marriage.

The statute to which we have referred has several times been

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considered by this court. *Reynolds* v. *Reynolds*, 8 Allen, 605. *Donovan* v. *Donovan*, 9 Allen, 140. *Foss* v. *Foss*, 12 Allen, 26. *Crehore* v. *Crehore*. 97 Mass. 330. The fullest discussion of the law applicable to a case like this, of which we have knowledge, is in *Reynolds* v. *Reynolds*, *ubi supra*. In that case a marriage was declared void into which a man was induced to enter by confiding in the representations of the woman whom he took for his wife that she was chaste, when in fact she was with child by another man. It has since been held that, to maintain a petition in such a case, it is not necessary to introduce evidence of express representations, and that a petition cannot be granted if it appears that the petitioner had himself been guilty of criminal intercourse with the woman before the marriage. The precise point decided in *Reynolds* v. *Reynolds* has been adjudicated in other States, and in this country seems to be generally accepted law. *Baker* v. *Baker*, 13 Cal. 87. *Carris* v. *Carris*, 9 C. E. Green, 516. See also *Morris* v. *Morris*, Wright (Ohio), 630; *Ritter* v. *Ritter*, 5 Black. 81; *Scott* v. *Shufeldt*, 5 Paige, 43. The law in England is held otherwise. *Moss* v. *Moss*, [1897] P. D. 263.

The opinion of the learned Chief Justice to which we have referred treats of the law in reference to ordinary contracts procured by fraud, and points out the distinction between contracts to marry, or executory contracts of marriage, and executed contracts of marriage. There is no reason why executory contracts of marriage should not be treated, in reference to the fraud of either party, like any other contracts. We think it is well settled that fraud of such a kind in its essential elements as would invalidate an ordinary contract, is a good defence to an action upon a contract to marry. *Van Houten* v. *Morse*, 162 Mass. 414. But after a contract to marry has ripened into a marriage, different considerations affect the case. On grounds of public policy, the law seeks to make the marriage relation in every case as nearly permanent as possible without doing injustice. The difference between the relations of a man and woman affianced, and their relations after marriage, is more than the difference between those who have made an ordinary executory contract and the same persons after the contract is executed. At marriage there

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is a change of status, which affects them and their posterity and the whole community. It is a change which, for important reasons, the law recognizes, and it inaugurates conditions and relations which the law takes under its protection. It is of such a nature that it cannot lightly be disregarded. The contracting parties take each other for better or for worse, and agree to abide the consequences of misinformation or mistake in regard to each other. Says Chief Justice Bigelow, in *Reynolds* v. *Reynolds*: "In the absence of force or duress, and where there is no mistake as to the identity of the person, any error or misapprehension as to personal traits or attributes, or concerning the position or circumstances in life of a party, is deemed wholly immaterial, and furnishes no good cause for divorce. Therefore no misconception as to the character, fortune, health, or temper, however brought about, will support an allegation of fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice. These are accidental qualities, which do not constitute the essential and material elements on which the marriage relation rests." The decree of nullity was entered in that case, not merely because the libellant was deceived in regard to the supposed chastity of the libellee, — for it is generally accepted law that unchastity of either party before marriage will not warrant a decree of divorce or nullity, — but because, besides the unchastity, the woman was in such a condition that she could not properly assume the duties of wifehood. More than that, she was in a condition to introduce into the husband's family spurious offspring, of which he would be presumed in law, if not in fact, to be the father. The deception, viewed in its different aspects, was in regard to facts essential to the very existence of the marriage relation. Her condition in reference to the objects of marriage was somewhat analogous to impotence, which, without reference to fraud, is always held to be a ground for a decree of nullity.

So far as we are aware, this is the only particular in which mistake or fraud in regard to the condition, character, or experience of one of the parties to a marriage has been held to be a ground for a decree of nullity or of divorce in favor of the other in this Commonwealth. Most courts in other juris-

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dictions have gone no further in favor of libellants. But in *Cummington* v. *Belchertown*, 149 Mass. 223, it appeared that a marriage was set aside for fraud by a court in New York, on the ground that the libellee had been afflicted with insanity before the marriage and had concealed the fact, and not long afterwards had again become insane. It was held by this court that the marriage could not have been declared invalid for this cause in this Commonwealth.

The case at bar rests solely upon fraud in regard to the bodily condition of the libellee. As we have already seen, the previous unchastity of the libellee is not enough to entitle the libellant to relief. Indeed, we are not quite certain from the report that the libellee might not have been constitutionally affected with the disease from his birth. But on the findings of the judge, his concealed disease was such as would leave with him no foundation on which the marriage relation could properly rest. It had advanced to such a stage as probably to be incurable. The libellant could not live with him as his wife without making herself a victim for life, and giving to her offspring, if she had any, an inheritance of disease and suffering. While this case lacks the element of introducing a bastard child into the husband's family, which existed in *Reynolds* v. *Reynolds*, it has the element of a loathsome incurable contagious disease to be communicated to the wife, which the other had not. Few if any would be bold enough to say that it was the duty of the libellant, on discovery of the fraud before consummation of the marriage, to give herself up as a sacrifice, and to become a party to the transmission of such a disease to her posterity.

It may be said that this cause for a decree of nullity is not different in kind, but only in degree, from other bodily or mental conditions which the law does not recognize as a good ground for a separation. There are many peculiarities of body or mind, natural, or acquired, or contracted, which may render one, in a broad sense, unfit for matrimony, and of which, if concealed until after marriage, the law can take no cognizance in a suit for a separation. In proceedings in court it is more difficult to deal with conditions like these in the case before us than with that in *Reynolds* v. *Reynolds*, because they are

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obscure, and it is hard to ascertain the truth. For this reason there is more danger in opening the door to libellants in such cases. Yet there may be circumstances in which justice requires that relief should be given.

In *Reynolds* v. *Reynolds*, much stress was laid upon the difference between an executory and an executed contract of marriage. But for fraud in procuring ordinary contracts, the law gives a remedy as well after the contract is executed as before. The learned Chief Justice did not say exactly at what stage a contract of marriage should be deemed to be executed. Clearly it is executory up to the time of the ceremony. Viewed in its legal aspect, it becomes a binding marriage as soon as the ceremony is performed; but the full execution of the contract contemplated by the parties in their original agreement is then just beginning, and is to continue during their joint lives. Their status up to the time of the ceremony is that of parties to an executory contract. Their status as soon as the ceremony is performed is that of persons legally married, who, with the sanction and under the forms of the law, have assumed new relations to each other and to the state. But these new relations are then rather inchoate than complete, and they do not assume their perfected form so as to have their full possible effect upon the parties and the community until consummation of the marriage. There are, therefore, reasons why a fraud like that in the present case, discovered before consummation of the marriage and at once made a ground for separation, should move the court more strongly in favor of the libellant than if the discovery had come later. 1 Bish. Mar. Div. & Sep. §§ 456, 461, 462. The reluctance of the court to recognize such frauds as a ground for legal proceedings is founded on considerations of public policy. These considerations are much less weighty in a case like the present than if the parties had cohabited for a considerable time before the proceedings were commenced. Although in many cases the distinction between consummated and unconsummated marriages in proceedings for separation has been overlooked, it is distinctly recognized in *Lyndon* v. *Lyndon*, 69 Ill. 43, and *Robertson* v. *Cole*, 12 Tex. 356, in each of which cases a decree of nullity was entered when the court said that the ground

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would have been insufficient if the marriage had been consummated.

We do not intimate that the concealed existence of venereal disease in one of the parties to a marriage will ordinarily be a sufficient ground for a decree of nullity. In most cases, presumably, the disease is curable. But, confining our decision to the facts before us, we are of opinion that it was in the power of the judge of the Superior Court to enter a decree for the libellant. *Decree for the libellant.*

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NATHANIEL H. EMMONS & another, executors, appellants, *vs.* EDWARD P. SHAW.

Suffolk. December 9, 1897. — June 22, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Tax — Collateral Legacies and Successions — Will — Power of Appointment.

The donor of a power of appointment, rather than the donee, must be regarded as the decedent whose estate is liable to taxation under St. 1891, c. 425, entitled "An Act imposing a tax on collateral legacies and successions."

PETITION to the Probate Court of Suffolk County, by the executors of the will of George W. Wales, for instructions concerning the sums, if any, due the Commonwealth from the estate of said Wales on account of St. 1891, c. 425, entitled "An Act imposing a tax on collateral legacies and successions." The judge entered a decree declaring the estate subject to the tax; and the executors appealed.

Hearing before *Knowlton*, J., who, at the request of the parties, reserved for the consideration of the full court the question whether, upon the agreed statement of facts, any taxes were leviable under the statute upon the several interests in the undivided half of Wales Wharf, appointed under the will of George W. Wales.

It was agreed that Thomas B. Wales devised by his will, proved in 1853, an undivided half of a wharf in Boston to his son George W. Wales for life, and subject to his disposal by

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will; that a portion of said undivided half was sold during the life of George under leave of court, and the proceeds reinvested under its order; and that George died in 1896, having executed the power of appointment by his will and codicil, duly proved in favor of certain relatives.

The case was argued at the bar in December, 1897, and afterwards was submitted on briefs to all the justices.

F. Brewster, for the appellants.

F. T. Hammond, Assistant Attorney General, for the appellee.

MORTON, J. The question in this case is whether George W. Wales, the donee of the power, is to be regarded as the decedent whose property passed by will, or whether Thomas B. Wales, the donor of the power, is to be regarded as the decedent. For it is manifest, we think, from the statute that the property referred to as passing by will is that of the decedent, and that it is the relationship of the parties described in the statute to the decedent which determines whether the property is subject to or exempt from taxation. In a sense, perhaps, one executing a power by will, so as to affect the disposition of property thereby, may be said to have caused its transmission by will, and therefore to be the decedent. It is settled in this Commonwealth that, if one has a general power of appointment and executes it by will, the property so appointed will be regarded as assets of his estate, and his creditors will be entitled to it in preference to his voluntary appointees. *Clapp* v. *Ingraham*, 126 Mass. 200. *Olney* v. *Balch*, 154 Mass. 318. See *Crawford* v. *Langmaid*, *ante*, 309.

It is also settled that, for the purposes of administration, it is more simple and convenient that the property should be administered by the executor of the will of the party exercising the power. *Olney* v. *Balch*, *ubi supra*. In some other respects the consequences which follow the exercise of the power of appointment would seem to tend to support the contention of the appellee that the donee of the power should be regarded as the decedent. *Hole* v. *Escott*, 4 Myl. & Cr. 187, 193. *Marlborough* v. *Godolphin*, 2 Ves. 61, 78, 79. Chitty, J., quoting St. Leonards on Powers, in *Rous* v. *Jackson*, 29 Ch. D. 521, 526. *Jackson* v. *Davenport*, 20 Johns. 537, 551. 2 Sugd. Powers, (3d Am. ed.) 19.

Nevertheless we think that the donor of the power rather

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than the donee must be regarded as the decedent. The Legislature has not defined the word "decedent" as used in the statute, and has not attempted in terms to deal with property passing under powers of appointment, general or otherwise. It simply has enacted, amongst other things, that the property of a decedent passing by will shall pay a tax except in certain cases. The construction of the statute must be determined, therefore, by the application to the subject matter of the ordinary rules of law relating to powers of appointment, and by considering the manner in which those rules have been applied elsewhere to statutes imposing a tax on successions or legacies. See *Ryalls* v. *Mechanics' Mills*, 150 Mass. 190, 191. Generally speaking, what is done under a power of appointment is to be referred to the instrument by which the power is created, and operates as a disposition of the estate of the donor. *Heath* v. *Withington*, 6 Cush. 497. *Sewall* v. *Wilmer*, 132 Mass. 131, 136. *Osgood* v. *Bliss*, 141 Mass. 474. *Collins* v. *Wickwire*, 162 Mass. 143. *Venables* v. *Morris*, 7 T. R. 342. *Braybrooke* v. *Attorney General*, 9 H. L. Cas. 150. *Attorney General* v. *Floyer*, 9 H. L. Cas. 477. *Attorney General* v. *Smythe*, 9 H. L. Cas. 497. *Charlton* v. *Attorney General*, 4 App. Cas. 427. *In re Lovelace*, 4 DeG. & J. 340. *Attorney General* v. *Mitchell*, 6 Q. B. D. 548. *In re Barker*, 7 H. & N. 109. *Attorney General* v. *Upton*, L. R. 1 Ex. 224. *Robinson* v. *Hardcastle*, 2 T. R. 241. 4 Kent Com. 327, 337. 2 Greenl. Cruise, 219. 2 Washb. Real Prop. (5th ed.) 320. This is the ancient and established rule. Co. Lit. 113 a. Co. Lit. 379 b, note 1. *Cook* v. *Duckenfield*, 2 Atk. 562, 567. *Middleton* v. *Crofts*, 2 Atk. 650, 662 *Gresham's case*, Moore, 261. Although for some purposes the instrument by which the power is executed is regarded as an independent instrument, and the execution of the power by will constitutes the property assets of the donee's estate, the general rule is as we have stated it. If the power is not executed, the property passes according to the disposition contained in the instrument creating the power, and neither the donee nor those claiming through him have any right in the property by virtue of the unexecuted power. In England it is expressly provided by statute that the party executing the power shall be regarded in the case of a general power as the one from whom the estate is received. But for

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the statute, it is clear, we think, that the donor of the power would be so regarded. *Braybrooke* v. *Attorney General*, 9 H. L. Cas. 150. *Attorney General* v. *Floyer*, 9 H. L. Cas. 477. *Attorney General* v. *Smythe*, 9 H. L. Cas. 497. *Charlton* v. *Attorney General*, 4 App. 427. *In re Lovelace*, 4 DeG. & J. 340. *Attorney General* v. *Mitchell*, 6 Q. B. D. 548. *In re Barker*, 7 H. & N. 109. *Attorney General* v. *Upton*, L. R. 1 Ex. 224. It is true that, in *Attorney General* v. *Upton*, Bramwell, B., speaking of § 2 of the Succession Duty Act, 16 & 17 Vict. c. 51, says that the words are to be interpreted in their ordinary sense, and that so interpreted the donee of the power would be the person from whom the property was derived. But in *Attorney General* v. *Mitchell*, Lindley, J., referring to this construction, which he calls "the popular construction," says that it never has been applied, but that the conveyancer's construction, as he terms it, "by which the appointment under a power is incorporated into the instrument creating the power," is the one which has been adopted. And the same principle has been applied in this country, so far as appears from the cases to which our attention has been called. *Commonwealth* v. *Williams*, 13 Penn. St. 29. *Commonwealth* v. *Duffield*, 12 Penn. St. 277. *In re Stewart*, 131 N. Y. 274. No doubt, as the appellee contends, the tax is in the nature of a duty upon the privilege of transmitting property by will, and the donee in executing the power by will exercises that privilege. But the statute does not provide that all property transmitted by will, or any other instrument intended to take effect on the death of the decedent, shall be taxed, but only the property of the decedent which passes by will or other instrument intended to take effect on his death to persons who do not sustain to him the relation described in the act. Any argument, therefore, derived from the fact that the tax is in the nature of a duty or excise on the privilege of transmitting property by will, is of no assistance in enabling us to determine whether the donor or donee of a power is to be regarded as the decedent.

The result is, that we think that so much of the decree of the Probate Court as decides that the remainder in the undivided half of Wales Wharf, and the proceeds of so much thereof as was sold under leave of court, are liable to a tax under St. 1891, c. 425, should be reversed. In all other respects said decree is affirmed. *So ordered.*

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LEXINGTON PRINT WORKS *vs.* INHABITANTS OF CANTON & others.

Norfolk. December 13, 1897. — June 22, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Taking of Water by Town — Curing Defect in Taking — Equity — Assessment of Damages.

A person who brings a bill in equity against a town and its water commissioners, to restrain an interference with his rights and for damages by reason of a defective taking of water, is not obliged, because the defect is cured subsequently, to have his damages assessed under the statute which authorizes the taking, but is entitled to have the bill retained for an assessment of all damages which he has sustained down to the filing of the same.

BILL IN EQUITY, filed May 26, 1896, against the inhabitants of Canton and its board of water commissioners, to have the acts of the defendants in taking or claiming to take the waters of Beaver Brook and its tributaries, and of York Pond and its tributaries, in the towns of Canton and Stoughton, and in filing an instrument descriptive of such taking, declared to be void, and to enjoin the defendants from further diverting the waters above named; and also for damages. After the former decision, the case came on to be heard, upon the pleadings and the plaintiff's motion for the appointment of a master to assess the damages, before *Knowlton*, J., who ordered the appointment of a master; and reserved for the consideration of the full court the question as to what rule should be adopted in the assessment of damages. The facts appear in the opinion.

The case was argued at the bar in December, 1897, and afterwards was submitted on briefs to all the justices.

B. N. Johnson & W. N. Buffum, for the plaintiff.

T. E. Grover, for the defendants.

MORTON, J. After the former decision in this case, reported 167 Mass. 341, in which it was held that the taking under the instrument filed in the registry of deeds on October 12, 1894, by the water commissioners was void, the commissioners filed another certificate on March 30, 1897, in which the quantity taken

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was stated as half a million gallons daily, being the amount specified in the vote of the town. The plaintiff does not contest the legality of this last certificate, or of the taking thereunder. The defendants have filed a supplemental answer setting it up, and contends that for all damages caused by taking half a million gallons daily, as well before as after the filing of the last certificate, the plaintiff's remedy is by petition in the manner prescribed in the acts authorizing the taking, which is the same as that where land is taken for the laying out of highways. St. 1885, c. 95, § 4. St. 1886, c. 168. The plaintiff contends that it is entitled to have all the damages which it sustained up to the time of bringing this bill assessed in this suit. These contentions present the principal, if not the only question in the case.

It is to be assumed that the defendants intended to proceed in accordance with the acts authorizing them to take the water for public uses. The plaintiff does not indeed controvert this. The only defect in the condemnatory proceedings was that the certificate omitted to state the quantity of water taken.

It is clear that after the filing of the last certificate the plaintiff could not have maintained an action of tort for the diversion of the amount named in it prior to the time of such filing. *Moore* v. *Boston*, 8 Cush. 274. *Spaulding* v. *Arlington*, 126 Mass. 492. *Lewis* v. *Boston*, 130 Mass. 339. It is also clear that after an actual taking, and before the filing of a certificate, the plaintiff could have maintained a petition for the assessment of its damages which would have included past and future damages. *Moore* v. *Boston*, *ubi supra*. Still further, it is clear that, if no certificate had been filed, or if the defendants had chosen to rely upon an insufficient one, the plaintiff would have been entitled to an injunction restraining the diversion, or to maintain an action of tort for the damages caused thereby. *Wamesit Power Co.* v. *Allen*, 120 Mass. 352. *Lund* v. *New Bedford*, 121 Mass. 286. *Warren* v. *Spencer Water Co.* 143 Mass. 9. *Hollingsworth & Vose Co.* v. *Foxborough Water Supply District*, 165 Mass. 186.

This case, however, is unlike any of those thus described, and more nearly resembles that of *Woodbury* v. *Marblehead Water Co.* 145 Mass. 509. When the bill was filed, the plaintiff was entitled to relief under it. Since the filing of the bill, the defect in the original certificate filed by the defendants has been

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cured. The plaintiff therefore no longer has any just ground for the issuing of an injunction to restrain the diversion of the water. But, speaking generally, jurisdiction in equity is fixed if the plaintiff is entitled to relief at the time of the bringing of the bill, and the court will retain the bill and administer a remedy in damages if that is appropriate, where the plaintiff loses his right *pendente lite* to purely equitable relief without fault on his part through some action on the part of the defendant. *Milkman* v. *Ordway*, 106 Mass. 232. *Woodbury* v. *Marblehead Water Co.* 145 Mass. 509. *Brande* v. *Grace*, 154 Mass. 210. *Case* v. *Minot*, 158 Mass. 577, 588, 589.

The defendants contend that this doctrine is not applicable to this case, and that the cases of *Moore* v. *Boston*, *Lewis* v. *Boston*, and *Spaulding* v. *Arlington*, *ubi supra*, are inconsistent with it. It is true that the statutes which authorize the taking provide a method for the assessment of damages. But we think that this does not take away any remedy which the plaintiff may have for what turns out to be a wrongful interference with his rights, though done under a supposed statutory authority, provided he seasonably avails himself of such remedy. If, after a defective taking has been cured by a valid taking, or if, after a taking valid in all respects except that the certificate was not filed within the proper time, the party aggrieved by such taking brings a petition, in the manner provided by statute, for the recovery of his damages, it well may be held that all damages to which he is entitled should be assessed in such proceedings. Such are the cases of *Lewis* v. *Boston* and *Spaulding* v. *Arlington*. So also, if, after an actual taking, the party aggrieved thereby files a petition for the assessment of his damages, it well may be held that the defendant should not be permitted to defeat his right to recover, because it had not filed, after the taking, within the time fixed, the certificate required. Such is the case of *Moore* v. *Boston*. But we find no reason, either in these cases or in the nature of the condemnatory proceedings, for holding that a party who has seasonably brought his bill to prevent an interference with his rights, which is unlawful because the defendant has failed to comply with statutory requirements in regard to the taking, should be compelled, because the defect is subsequently cured, to have his damages

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for such unlawful interference assessed under the statute which authorizes the taking. It is argued that the rule of damages might be different in such a case from what it would be under the statute, but we do not find it necessary to decide that now.

The result is, that a majority of the court think that the case should stand for hearing in regard to all damages which the plaintiff has sustained down to the filing of the bill.

So ordered.

MARY E. GUNN *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. December 16, 1897. — June 22, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Interrogatories to President of Corporation — Death — Employers' Liability Act — Defect in "Ways, Works, or Machinery" — Evidence — Superintendence.

It seems that, in an action against a railroad corporation for the death of an employee, its president may be ordered to answer interrogatories propounded under Pub. Sts. c. 167, §§ 49 *et seq.*, which he refuses to answer on the ground that he has no personal knowledge of the subjects of inquiry, the interrogatories being otherwise unobjectionable; and the fact that testimony is introduced at the trial referring to many, if not all, of the matters referred to in the interrogatories does not cure the error in refusing to order them to be answered.

A truck which consists of axles, wheels, and a frame, all fastened together and fitted to the tracks, and which is in constant use with other trucks as a part of the appliances of the repair shop of a railroad corporation for doing the work that is carried on there, is a part of the ways, works, or machinery within the meaning of St. 1887, c. 270; and in an action for the death of an employee caused by the falling upon him of a locomotive which had been placed on the truck, there is evidence that the truck was defective, if it appears that it had been there fifteen or sixteen years or more, that the effect of rolling such a truck on an iron rail is to flatten out the wheels, that the tendency of the constant use of iron is to weaken it for supporting weights, and that using it for heavy weights would weaken it much quicker; that testimony also would have tended to show, if admitted, as it should have been, that engines were twice as heavy as when the truck was purchased fifteen or seventeen years before and that this particular engine was one of the heaviest on the defendant's railroad.

At the trial of an action against a railroad corporation for the death of an employee caused by the falling upon him of a locomotive, which had been placed on a truck in the repair shop, it is competent for the jury to find that, although the

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iron was sound where the wheel of the truck broke, yet, by reason of its long use and the increase in the weight of engines, the truck had become unsuitable for the use to which it was put, and that, if the wheel had been of proper strength, it would have withstood the strain caused by meeting the obstruction on the rail.

At the trial of an action under the employers' liability act, St. 1887, c. 270, for causing the death of an employee, alleged to have been due to the negligence of a person in the defendant's service intrusted with "superintendence," a fellow employee cannot be asked, "Have you ever noticed anything with regard to the care or the method which the superintendent uses in his work?" and, "Have you noticed whether or not the superintendent in directing the work has any tendency either to show great care or to rush work?"

TORT, under the employers' liability act, St. 1887, c. 270, by the widow of John A. Gunn, to recover for his death, on November 1, 1895, while he was standing in a repair shop of the defendant in South Boston, upon a step-ladder and was varnishing a tender, then upon one of the tracks in the shop, with his back to a locomotive then being repaired upon an adjoining track. At the trial in the Superior Court, before *Hopkins*, J., it appeared that the locomotive was blocked up at each end upon trucks which rested each upon four wheels of cast iron weighing about thirty pounds each; that in moving the locomotive a wheel of the truck was broken at a point where it came in contact with something with which it had been trigged, and of which there was testimony that it looked like a hexagon nut, and that the locomotive fell over upon Gunn and killed him.

The judge directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The remaining facts appear in the opinion.

H. N. Shepard, for the plaintiff.

J. H. Benton, Jr. & C. F. Choate, Jr., for the defendant.

MORTON, J. The plaintiff filed interrogatories to the president of the defendant corporation under Pub. Sts. c. 167, §§ 49 *et seq.* He answered three of them, but refused to answer the others, which related to various matters pertaining to the accident, on the ground that he had no knowledge, meaning no personal knowledge, about the subjects of inquiry. The first question for consideration is whether he should have been ordered to answer the interrogatories which he refused to answer.

The defendant contends that the president could be required

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to answer only as to those matters of which he had personal knowledge. It is not contended that the interrogatories were otherwise objectionable.

"The main purpose of these provisions of the practice act," says the court in *Wilson* v. *Webber*, 2 Gray, 558, 561, referring to those provisions of St. 1852, c. 312, which are now incorporated in Pub. Sts. c. 167, §§ 49 *et seq.*, "was to substitute, in place of the tedious, expensive, and complex process of a bill of discovery on the equity side of the court, an easy, cheap, and simple mode of interrogating an adverse party, as incident to and part of the proceedings in the cause in which the discovery was sought." To facilitate this object the statute provides that, if a corporation is a party to a suit, "the opposite party may examine the president, treasurer, clerk, or any director or other officer thereof, in the same manner as if he were a party to the suit." Pub. Sts. c. 167, § 53. This no doubt grew out of and was suggested by the practice which prevailed in equity of making an officer a party in a case where discovery was sought from a corporation. *Post* v. *Toledo, Cincinnati, & St. Louis Railroad*, 144 Mass. 341, 345. *Wilson* v. *Church*, 9 Ch. D. 552, 555, 556.

The effect of the statute is to give to the opposite party the same right of interrogating an officer as if he were a party, that is, the corporation itself. Under the English practice in chancery it is settled that a party may be compelled to answer, not only as to those matters which are within his own personal knowledge, but also as to those respecting which there is information by means of inquiries from his servants, agents, or attorneys fairly within his reach. *Glengall* v. *Frazer*, 2 Hare, 99. *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644, 659. *Bolckow* v. *Fisher*, 10 Q. B. D. 161. Pom. Eq. Jur. § 204. Adams, Eq. 12. Such information is regarded as being in a sense information possessed by him. Under Rule 5, Order XXXI. of the Rules of the Supreme Court, 1883, adopted by authority conferred by the Judicature Act of England, (see Bray on Discovery, 637,) which differs from Pub. Sts. c. 167, § 49, only in not allowing interrogatories to be filed as of right, it has been said: "Directors of a company, in answering interrogatories, must not only answer as to their individual knowledge, but in answering for

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the company they must get such information as they can from other servants of the company who presumably have conducted the transaction in question." *Southwark Water Co.* v. *Quick*, 3 Q. B. D. 321, per Cotton, L. J.

The object of discovery is to obtain information material to the merits of the case of the party seeking it which is within the control or possession of the opposite party, or to compel admissions in respect to material matters. Bray on Discovery, 1, 2. It tends to avoid expense and delay, and we see no good reason for holding that, when it is sought through interrogatories filed under the statute, it should be granted less freely than in equity, or even that it should be limited to cases in which it would be granted in equity. The statute imposes no such limitation. The fact that the information may be obtained through witnesses does not take away the right of discovery through interrogatories. *Hubbard* v. *Hubbard*, 6 Gray, 362. It may be more conveniently obtained by means of interrogatories. In the case of an officer of a corporation, the information must be official, that is, derived through his connection with the corporation. *Hancock* v. *Franklin Ins. Co.* 107 Mass. 113, 115. In any case, where the answers are upon information and belief, it may be so stated. But an admission is none the less binding because made upon information and belief, and for that reason the party interrogating properly may insist that the party interrogated shall make reasonable inquiries of his servants, agents, and attorneys, who were engaged as such in the transaction in question, for the purpose of ascertaining the facts in relation thereto, and answering accordingly. The president of a corporation occupies a position superior in authority to the other officers and to the employees, and generally speaking has a right to require from them information in regard to matters arising in and connected with the discharge of their duties. In a sense he sustains towards them the relation of employer to employee, or of principal and agent. We do not mean to intimate that the duty of inquiry obliges him to seek information from those who have left the service of the corporation, or that he is to be subjected to unreasonable trouble and expense in answering the interrogatories, or that discovery can extend to all information within the possession of those in the employment of the corporation,

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however obtained. The interrogatories are addressed to the conscience of the party. They do not require him to set down mere rumors, or simply to state what he has been told. They call for facts, and, in addition to the disclosure of such personal knowledge as he may have, if any, they require such reasonable investigation on his part by means of inquiries from those who are at the time subject to his direction or control as will enable him to state what the facts are. The party interrogating cannot compel him to get up his case for him, nor to disclose his own case, though the fact that some of the information required by the answers may be material to his own case will not excuse him from answering, if it also is material to that of the party interrogating.

We do not think that the right of discovery extends to all information, however acquired, in the possession of the officer interrogated, or of those subject to his direction or control. If he or they have become possessed of material information derived through other than official channels, or in other ways than in the course of their employment at the time of the transaction in question, we do not think that the party interrogating is entitled to a discovery of it. Possibly, also, if an agent has investigated the matter and has ascertained and reported the facts, the party interrogating may not be entitled to a discovery of them. It is not necessary, however, to decide that now. The fact that the action is in tort, and relates to personal injuries, and that discovery could not be had, perhaps, in equity in an action for personal injuries, does not, we think, affect the right to file interrogatories. In England discovery by interrogatories has been allowed under the rule above referred to in a great variety of cases, and as to documents has been carried so far as to call forth strong expressions of disapproval from some judges; (see *Kennedy* v. *Dodson*, [1895] 1 Ch. 334, and *Graham* v. *Sutton*, [1897] 1 Ch. 761, 765;) but there can be no doubt, we think, of its utility when properly administered, and we are of opinion that, no objection having been made to the questions themselves, they should have been answered.

Testimony was introduced by the plaintiff at the trial tending to show what the facts were in regard to many, if not all, of the matters referred to in the interrogatories; but this did not cure

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the error of refusing to order them to be answered. *Baker* v. *Carpenter*, 127 Mass. 226.

We think that the truck constituted a part of the ways, works, or machinery, within the meaning of St. 1887, c. 270. Though comparatively simple in construction, it consisted of axles, wheels, and a frame, all fastened together and fitted to the tracks, and was, as there was testimony tending to show, in constant use with other trucks as a part of the appliances of the repair shop for doing the work that was carried on there. It was assumed in *Geloneck* v. *Dean Steam Pump Co.* 165 Mass. 202, and *O'Keefe* v. *Brownell*, 156 Mass. 131, that similar appliances constituted parts of the ways, works, or machinery.

We think, also, that there was evidence that it was defective. There was testimony tending to show that it had been there fifteen or sixteen years or more, that the effect of rolling such trucks on an iron rail was to flatten out the wheels, that the tendency of the constant use of iron is to weaken it for supporting weights, and that using it for heavy weights would weaken it much quicker. The testimony also would have tended to show, if admitted, as we think it should have been, that engines were twice as heavy as when the truck was purchased, fifteen or seventeen years ago, and there was evidence that the engine which was being supported by the truck, and which fell over, was one of the heaviest on the defendant's railroad. We think that, although the iron was sound where the wheel broke, it would have been competent for the jury to find that by reason of its long use, and the increase in the weight of engines, the truck had become unsuitable for the use to which it was put, and that, if the wheel had been of proper strength, it might have withstood the strain caused by meeting the obstruction on the rail. See *Geloneck* v. *Dean Steam Pump Co.*, *ubi supra*.

The questions which were asked in regard to what the witness had observed as to the care of the superintendent were rightly excluded.* We discover no error in regard to other aspects of

* These questions were asked of a fellow employee on direct examination, and are as follows:

"Q. Have you ever noticed anything with regard to the care or the method which the superintendent uses in his work?

"Q. Have you noticed whether or not the superintendent in directing the work has any tendency either to show great care or to rush work?"

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the case, but, as the evidence may be different on a new trial, we do not deem it necessary to consider them. In the opinion of a majority of the court, the exceptions should be sustained.

Exceptions sustained.

CHARLES H. WORSTER *vs.* GEORGE S. FORBUSH & another.

Suffolk. January 18, 1898. — June 22, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Partnership of Lawyers — Use of Firm Name — Promissory Note — Estoppel — Ratification.

An attorney at law, who is a member of a partnership of lawyers, has no implied authority by reason of the partnership to borrow money on the credit of the partnership, or to sign or indorse a negotiable promissory note in the name of the partnership; and it is immaterial that the money borrowed by him is used to pay the regular and ordinary expenses of the partnership, or that the holder of the note is a *bona fide* purchaser for value before maturity; and an action by such holder against F., the partner who denies any knowledge of the making and indorsement of the note, and the authority of K., the copartner, to use the firm name in indorsing the note, cannot be maintained if there is no evidence that F. gave K. such authority, or that F. was estopped by his conduct from denying K.'s authority, or that he had ratified what K. had done.

CONTRACT, on a promissory note signed by the defendant, John W. Keith, dated December 13, 1895, for $116.33, payable one month after date to his own order, and indorsed by him in his own name and in the firm name of "Forbush & Keith."

At the trial in the Superior Court, before *Sheldon*, J., it appeared that Forbush and Keith were practising lawyers in the city of Boston, under the firm name of "Forbush & Keith," and that Keith indorsed the firm name of "Forbush & Keith" on the back of the note, which was given in renewal of another note, this other note being in renewal of a previous note; that all of the notes were identical; that for the original note Keith received ninety dollars from one Clarke, who also held the notes which renewed the original note; and that this money was used by Keith to pay office rent, constables' fees, and matters of that kind, incident to the business of the firm. There was evidence

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that the defendant Forbush spent most of his time in New York City, and that from time to time he remitted moneys to Keith on account of office rent and firm expenses; but there was no evidence as to the state of accounts between Forbush and Keith and the firm. It further appeared that the plaintiff bought the note in suit from Clarke, a few days after its date, for a full and valuable consideration; that he was a *bona fide* holder for value before maturity and without notice, except that it did appear that the plaintiff knew that the defendants Forbush and Keith were practising lawyers, and did not know of their being engaged in any business other than the practice of law. And it also appeared that the firm of Forbush and Keith was engaged in no business other than the practice of law. At the trial, it appeared that the defendant Forbush knew nothing until after this action was brought about the giving of the note, or any notes of which it was in renewal.

The judge directed the jury to return a verdict for the defendant Forbush, who alone defended, and, with the consent of both parties, reported the case for the determination of this court. If the ruling was right, judgment was to be entered on the verdict; otherwise, judgment was to be entered for the plaintiff for the amount claimed in the declaration.

C. F. Eldredge, for the plaintiff.

F. Paul, for the defendant Forbush.

FIELD, C. J. An attorney at law who is a member of a partnership of lawyers has no implied authority by reason of the partnership to borrow money on the credit of the partnership, or to sign or indorse a negotiable promissory note in the name of the partnership; and it is immaterial that the money borrowed is used to pay the regular and ordinary expenses of the partnership, or that the holder of the note is a *bona fide* purchaser of the note for value before its maturity. The partnership of Forbush and Keith was not engaged in any other business than the practice of law. Any person taking a promissory note signed or indorsed in the name of a partnership by one partner, in order to hold the other partners, has the burden of proving that the partner who signed the name was authorized by the other partners to sign or indorse notes. Such authority is often to be inferred from the nature of the partnership busi-

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ness. In the present case there was no evidence of any express or implied authority given by Forbush to Keith to sign the partnership name on the back of the note, unless authority can be inferred from the fact that they were partners in the practice of law. That fact is not enough. The nature of the business did not require the giving of promissory notes by the partnership, and there is no general custom or usage known to us for lawyers in partnership to give or indorse notes in the name of the partnership. There was no evidence to show that Forbush had held Keith out as authorized to use the partnership name in signing or indorsing promissory notes, or that Forbush was estopped by his conduct from denying Keith's authority to do this, or that he had ratified what Keith had done. *Breckinridge* v. *Shrieve*, 4 Dana, 375, 378. *Marsh* v. *Gold*, 2 Pick. 284. *Pease* v. *Cole*, 53 Conn. 53. *Benton* v. *Roberts*, 4 La. An. 216. *Hedley* v. *Bainbridge*, 3 Q. B. 316. *Forster* v. *Mackreth*, L. R. 2 Ex. 163. *Deardorf* v. *Thacher*, 78 Mo. 128. *Bays* v. *Conner*, 105 Ind. 415. *Smith* v. *Sloan*, 37 Wis. 285.

There must be judgment on the verdict for the defendant Forbush. *So ordered.*

C. W. WITTERS *vs.* GLOBE SAVINGS BANK OF CHICAGO & trustee.

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185 382

Suffolk. January 28, 1898. — June 22, 1898.

Present: FIELD, C. J., ALLEN, LATHROP, & BARKER, JJ.

Trustee Process — Foreign Plaintiff — Foreign Claimant — Assignment.

Whatever may be true of the effect of a compulsory assignment, which is valid by the laws of another State where it was made, and which purports to convey to the assignee all the property and effects of a corporation "wheresoever situate," when credits of the assignor are attached in this Commonwealth by inhabitants hereof, there is no good reason why this court should protect, against the rights of the assignee, an attachment made by an inhabitant of still another State after the assignment.

TRUSTEE PROCESS. The Chicago Title and Trust Company, a corporation organized under the laws of the State of Illinois,

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petitioned to be allowed to intervene as a claimant of the funds. The plaintiff was an inhabitant of Vermont.

The case was submitted to the Superior Court, and, after judgment charging the trustee and dismissing the petitioner's claim, to this court, on appeal, upon agreed facts, which appear in the opinion.

R. B. Kendall, for the claimant.

F. H. Williams, for the plaintiff.

FIELD, C. J. In this case the plaintiff is not an inhabitant of Massachusetts, but of Vermont. The Chicago Title and Trust Company claims title to the funds in the hands of the alleged trustee, not only by virtue of the decree of the Circuit Court of Cook County in the State of Illinois, entered on April 5, 1897, appointing it a receiver of the defendant, but by virtue of an assignment under seal to it as such receiver, executed by the defendant on April 6, 1897, in pursuance of the decree. That assignment purports to convey to the receiver all the property and effects of the defendant "wheresoever situate." The defendant is a corporation organized under the laws of the State of Illinois, and it is agreed that said Circuit Court "had jurisdiction to appoint said receiver." The plaintiff's writ was served on the alleged trustee on April 13, 1897. Such an assignee has a right to intervene in the proceedings and claim the funds. *Buswell* v. *Order of the Iron Hall*, 161 Mass. 224. *Dennis* v. *Twitchell*, 10 Met. 180. *Norton* v. *Piscataqua Ins. Co.* 111 Mass. 532.

We think that the assignment must be held valid as against the subsequent attachment by the plaintiff. *Frank* v. *Bobbitt*, 155 Mass. 112. *Faulkner* v. *Hyman*, 142 Mass. 53. It is argued by the counsel for the plaintiff that the assignment shown in this case is not voluntary, and so should not be sustained as against the attachment, and *Taylor* v. *Columbian Ins. Co.* 14 Allen, 353, is relied on. The assignment in this case is not a judicial assignment or a statutory assignment, but a compulsory assignment, valid by the laws of Illinois, where it was made. How far such an assignment can be regarded as having the effect of a voluntary assignment, or as having only the effect of a judicial or statutory assignment, has not been decided in this Commonwealth.

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As a general rule, assignments and conveyances which defendants in equity are compelled to make are as valid as if voluntarily made. The case sets out no statutes of the State of Illinois, and we cannot take judicial notice of such statutes. We must assume on the papers before us that the receiver was appointed under the general powers of a court of equity, and that the assignment was made by a defendant over which the court had full jurisdiction. See High, Receivers, (3d ed.) § 244; Gluck & Becker, Receivers, (2d ed.) 225 *et seq.* It seems to have been assumed by all parties that the assignment was made for the creditors of the defendant under proceedings for their benefit. Whatever may be true of such an assignment when credits of the assignor are attached here by inhabitants of Massachusetts, we perceive no good reason why we should protect, against the rights of the assignee, an attachment made by an inhabitant of Vermont after the assignment. See *Cunningham* v. *Butler*, 142 Mass. 47, 52; *Cole* v. *Cunningham*, 133 U. S. 107, 128; *May* v. *Wannemacher*, 111 Mass. 202; *Long* v. *Girdwood*, 150 Penn. St. 413; *Burlock* v. *Taylor*, 16 Pick. 335.

Judgment of the Superior Court charging the trustee and dismissing the petition of the claimant reversed, and judgment to be entered allowing said petition and discharging the trustee.

WILLIAM J. MAHONEY *vs.* CITY OF BOSTON.

Suffolk. March 7, 1898. — June 22, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Employers' Liability Act — Liability of City of Boston to Employee injured in Construction of Subway.

It is a defence to an action against the city of Boston, under the employers' liability act, St. 1887, c. 270, and acts in amendment thereof, for personal injuries occasioned to a person at work on the subway authorized by St. 1894, c. 548, that the work was a public one over which the defendant had no control, but which was in charge of the transit commissioners, who were public officers engaged in the performance of public duties, and independent of the defendant, and not its servants or agents.

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TORT, for personal injuries occasioned to the plaintiff by the fall of a derrick while he was at work on a section of the subway in the city of Boston. The declaration was under the employers' liability act, St. 1887, c. 270.

Trial in the Superior Court, before *Maynard*, J., who ruled that the action could not be maintained, and directed a verdict for the defendant. The plaintiff alleged exceptions, and the judge reported the case for the determination of this court. If the ruling was right, the verdict was to stand; otherwise, it was to be set aside, and a new trial granted.

The case was argued at the bar in March, 1898, and afterwards was submitted on briefs to all the justices.

W. B. Grant, for the plaintiff.

F. E. Hurd, for the defendant.

MORTON, J. The plaintiff was injured by the fall of a derrick while he was at work on a section of the subway in Boston. The management of the derrick was under the direction of one Daniels, a foreman, and there was evidence that his sole or principal duty was that of superintendence, that the fall of the derrick was caused by his negligence, and that the plaintiff was in the exercise of due care. The plaintiff was in the employ of the Boston Transit Commission, and he and the others who were at work on the section, and all the expenses of construction, were paid on bills and pay-rolls which were approved by the commission, out of the proceeds of $3\frac{1}{2}$ per cent bonds issued by the city of Boston, under St. 1894, c. 548, § 37. The commission was building this section under that statute, and, with the approval of the railroad commissioners, has leased the subway to the West End Street Railway Company for twenty years, to begin when determined by the transit commission, at a yearly sum of $4\frac{7}{8}$ per cent on the actual net cost of the subway, payable to the city of Boston, and to be applied by it in accordance with St. 1894, c. 548, § 38. That section provides that all rents received for the use of the subway shall be used, "first, to meet any deficiency in the sinking fund requirements for said bonds, after the payments hereinbefore provided for have been made; second, to meet the interest on said bonds, and the surplus, if any, as a part of the general revenue of said city for the maintenance of its public parks."

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Inasmuch as the city of Boston is to pay all of the costs and expenses of such subways as the commission may construct, and of such lands and rights as it may take under the authority of the act, and is to receive all rents, percentages, or other annual compensation paid for the use of them, we assume, without deciding, that the subways and such lands and rights will belong to the city. But neither that fact, nor the fact that some members of the commission are appointed by the mayor and confirmed by the aldermen, will necessarily render the city liable. The question is whether the work is a public work and the commissioners are public officers charged with the performance of public duties in carrying it out, or whether the work, though public, is partly commercial in its character and for the benefit of the city of Boston, and in performing it the commissioners act as its servants or agents. It is only in the latter event that the city is liable for the negligence of the foreman. The case of *Prince* v. *Crocker*, 166 Mass. 347, would seem to go far towards determining that the work is a public work. Though the point was not directly adjudicated in that case, the decision proceeds on the assumption that the work was in its nature a public work.

Independently, however, of that case, we think that the work must be regarded as a public work, the expense of which the Legislature has imposed on the city of Boston, as it rightfully could do, and for the doing of which it has provided agents, appointed in part by the Governor and Council and in part by the mayor and aldermen of Boston. The object is to promote the convenience of the inhabitants of Boston, and of the public generally, by furnishing increased accommodations for public travel. The commission constitutes in effect a special board, established by the Legislature for the purpose of laying out and building in the city of Boston at the expense of that municipality public ways along certain lines and between certain termini, and for that purpose it is given large powers and is rendered independent of any control or direction on the part of the city of Boston. The city authorities have nothing to do with the manner in which the work shall be done, or with the persons engaged in its performance; they have no control over the transit commissioners, and no voice in fixing the terms and

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rates for the use of the subway when completed, or any part thereof. Although the act did not take effect until accepted by the city, that does not render the city liable. *Tindley* v. *Salem*, 137 Mass. 171. There can be no doubt, we think, that the members of the transit commission are public officers engaged in the performance of public duties, and we do not see how they can be regarded as the servants or agents of the city.

But assuming that they could be regarded as in some sense the servants of the city, we think that the element of commercial advantage, or pecuniary benefit to the city, is not such as to render it liable for the negligence of the foreman. As already observed, the work is intended to promote the convenience of the public generally. The statute requires the city to apply any rents or compensation which it may receive from the use of any of the "subways, tunnels, or adjacent locations, or for any use of any lands or rights taken under authority" of the act, first, to meet any deficiency in the sinking fund requirements for the bonds; second, to meet interest on the bonds; and third, to use the surplus, if any, as a part of the general revenue of the city for the maintenance of the public parks. The city can use the rent or compensation which it receives only as thus directed. For aught that appears, the Legislature may direct it to be used in some other manner. The city has no general control over it. The undertaking, so far as the city is concerned, lacks the features of one which is partly commercial in its character, and intended for the benefit of the city. The surplus, if any, is to be used for the support of the public parks; in other words, for the general public benefit, which has some tendency to show that the Legislature regarded the work as one of general public utility. The case differs, therefore, from those cases in which it has been held that when a city or town engages in a public undertaking which is partly commercial in its character, and over the construction and management of which it has full control by means of agents or officers appointed or elected by it and the benefits of which it receives, it is liable for injuries sustained in consequence of the negligence of one employed in doing the work, even if it be conceded that for the time being there is a surplus, and that the city is benefited by having it applied to the maintenance of the parks, and being relieved to some extent

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from the obligation to raise by taxation money which it otherwise would be obliged to raise. *Taggart* v. *Fall River*, 170 Mass. 325. *McCann* v. *Waltham*, 163 Mass. 344. *Curran* v. *Boston*, 151 Mass. 505. *Norton* v. *New Bedford*, 166 Mass. 48. The benefit is a mere incident of an undertaking which is public in its nature, and is carried out by public officers over whom the city has no control, and no case, we think, has gone so far as to hold a town or city liable under such circumstances.

Judgment on the verdict.

FRANK J. WHITESIDE *vs.* WILLIAM J. LOWNEY.

Suffolk. March 11, 1898. — June 22, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Malicious Prosecution — Larceny — Parol Evidence as to Goods not enumerated in Officer's Return — Discretion of Presiding Justice.

At the trial of an action for malicious prosecution in causing the plaintiff to be arrested and bound over on a charge of larceny of goods from an officer which he had attached on a writ in favor of the defendant against the plaintiff, it is open to the defendant to show by parol evidence that the officer had in fact attached the goods, though they were not enumerated in his return; and its exclusion by the judge on the ground that the attachment and the goods that were attached must appear from the officer's return on the writ, without calling the attention of the jury in any way to the effect of the plaintiff's admission that the officer had attached the property, and that the plaintiff had broken open the premises and assisted in carrying it away, operates to the prejudice of the defendant.

Whether further evidence shall be received upon a point expressly admitted by the adverse party is wholly within the discretion of the justice presiding at the trial.

TORT, for malicious prosecution. At the trial in the Superior Court, before *Bond*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

P. B. Kiernan, for the defendant.

G. C. Coit, for the plaintiff.

MORTON, J. This is an action for malicious prosecution, in causing the plaintiff to be arrested and bound over on a charge of larceny. The grand jury returned "No bill." The alleged

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larceny consisted in taking from the possession of William A. Sheehan, a constable, goods which he had attached on a writ in favor of the defendant against the plaintiff, and had stored in certain premises which the plaintiff broke open and from which he assisted in carrying away the goods. If the goods had been taken by the plaintiff with a felonious intent, it would have constituted a larceny of them from Sheehan. *Commonwealth* v. *Greene*, 111 Mass. 392. As one step in showing that there was reasonable cause to believe that the plaintiff was guilty of larceny, the defendant had a right to show that the goods were under attachment by Sheehan. For this purpose he offered oral testimony by Sheehan to show what goods he had attached. This was excluded, on the objection of the plaintiff, as we must assume, on the ground that the attachment and the goods that were attached must appear from the officer's return on the writ in which they were attached. We think that this was error, and that it was open to the defendant to show by oral evidence in the action by the plaintiff against him that the officer had in fact attached the goods, though they were not enumerated in his return. *Hovey* v. *Lovell*, 9 Pick. 68. *American Bank* v. *Doolittle*, 14 Pick. 123.

The remaining question is whether the exclusion of the evidence operated to the prejudice of the defendant. The plaintiff admitted that the constable had attached the property, and that he had broken open the premises and assisted in carrying it away. If the court had excluded the evidence, in the exercise of its discretion, on the ground of the plaintiff's admission, the defendant would have had no just ground for exception to the ruling. *Dorr* v. *Tremont National Bank*, 128 Mass. 349, 360. But the court did not put the exclusion of the evidence on that ground, and apparently would have admitted it but for its view regarding the effect of the officer's return. A majority of the court cannot say that its exclusion, under the circumstances under which it was excluded, without calling the attention of the jury in any way, so far as appears, to the effect of the plaintiff's admission, may not have operated to the defendant's prejudice, and that the defendant was not entitled to introduce the evidence notwithstanding the plaintiff's admission. *Priest* v. *Groton*, 103 Mass. 530. *Commonwealth* v. *McCarthy*, 119 Mass. 354.

Exceptions sustained.

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LAMSON CONSOLIDATED STORE SERVICE COMPANY *vs.* PRUDENTIAL FIRE INSURANCE COMPANY.

Suffolk. March 11, 1898. — June 22, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Fire Insurance — Construction of Policy — Arbitration — Condition Precedent to Action — Waiver — Pleading.

Under the provision in a policy of insurance against loss by fire, in the Massachusetts standard form, that, if the parties fail to agree as to the amount of the loss, it is mutually agreed that the question shall be referred to arbitrators to be chosen, whose decision shall be final, "and such reference, unless waived by the parties, shall be a condition precedent to any right of action" to recover for the loss, such agreement to refer the loss to arbitration is a condition precedent to the right of the assured to bring an action upon the policy.

After a loss by fire of property insured by a policy in the Massachusetts standard form, the assured sent proofs of loss to the insurance company, which wrote to him for further information in regard to certain matters, using this language: "Please understand we do not intend by anything herein said to make any admission of legal liability, reserving the settlement of that question until after we shall have obtained further information." The assured furnished the information required. Subsequently other information was asked for and furnished, and finally the assured, in reply to a letter from the company asking for still further information, stated that certain proofs which had been furnished were correct, and requested the company to inform him at an early date "regarding your intention to pay said claims." No reply was made to this, and the assured, after waiting nearly a year, brought an action on the policy. There was evidence tending to show that, in conversations between the representatives of the parties, the company denied its liability and never suggested that the loss should be submitted to arbitration. *Held*, that there was evidence of a waiver by the defendant of the condition in the policy in regard to arbitration which should have been submitted to the jury.

Performance of the condition as to arbitration in a policy of fire insurance, in the Massachusetts standard form, or excuse for its non-performance, should be alleged in an action upon the policy, but the absence of such allegation should be availed of by demurrer, and the declaration may be amended.

CONTRACT, upon a policy of insurance for $10,000, against loss by fire on the plaintiff's "leasehold interest" in its various systems of store service in the United States, for one year from December 3, 1890. Trial in the Superior Court, before *Blodgett*, J., who, at the defendant's request, ruled that the plaintiff was not entitled to recover, and directed the jury to return a verdict

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for the defendant, and the plaintiff alleged exceptions. The facts appear in the opinion.

The case was argued at the bar in March, 1898, and afterwards was submitted on briefs to all the justices.

B. E. Kemp, for the plaintiff.

L. D. Brandeis, for the defendant.

MORTON, J. It is not contended that the plaintiff had not under its leases an insurable interest in the systems that were destroyed, and in the rentals accruing from them.

There was testimony tending to show that there was an oral contract of insurance entered into on December 3, 1890, though the policy was not issued till December 11, and that one or more of the systems was destroyed by fire before the last named date. We do not need to consider whether knowledge on the part of the plaintiff of the loss before the policy issued would affect its right to recover; (see *Mead* v. *Phenix Ins. Co.* 158 Mass. 124, 126; *Hallock* v. *Commercial Ins. Co.* 2 Dutch. 268;) nor what is the amount for which the defendant is liable if the plaintiff is entitled to maintain its action.

The defendant contends that the provision in the policy in regard to a reference in case the parties are unable to agree as to the amount of loss is a condition precedent to the plaintiff's right to maintain an action, and that, not having been complied with or waived, as it insists, it is a bar to the maintenance of the action.

The provision in the policy is the same as that in the standard form established by St. 1887, c. 214, § 60, and is as follows: "In case of loss under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference unless waived by the parties *shall be a condition precedent to any right of action in law or equity to recover for such loss.*" The Italics are those of the standard form as enacted, and are also in the policy. We think that this constitutes a condition precedent. It is de-

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clared to be so in express terms. But for that declaration it is doubtful if it could be so regarded. *Reed* v. *Washington Ins. Co.* 138 Mass. 572, 575. *Clement* v. *British American Assurance Co.* 141 Mass. 298. The policy does not provide that no action shall be brought upon it until or unless (which are the words more commonly signifying a condition precedent) the amount has been ascertained by arbitration.

The condition being a condition precedent, it is incumbent on the plaintiff to show that it has complied with it, or that the defendant has waived it. The plaintiff contends that there is evidence tending to show that it has been waived by the defendant. The losses occurred on different dates, from December 5, 1890, to January 23, 1891, inclusive. The plaintiff sent proofs of loss to the defendant on March 10, 1891. On April 13 following, the defendant sent a letter to the plaintiff asking for further information in regard to certain matters, and using in the letter the following language: "Please understand we do not intend by anything herein said to make any admission of legal liability, reserving the settlement of that question until after we shall have obtained further information." If this cannot be fairly interpreted as a positive denial of liability on the part of the defendant, it at least cannot be construed as an admission of liability, and we think that the plaintiff was justified in assuming, if it did so assume, that the defendant did not concede, but refused to admit, its liability, and was not ready to pay the losses until it had obtained further information, without intimating that it might then be ready to pay them. It is noticeable that the letter, neither in terms nor inferentially, expresses even a qualified willingness to pay the losses, or any of them, or suggests that the only question is one of amount. The plaintiff furnished the information required. Subsequently other information was asked for and furnished, and finally, on May 29, 1891, the plaintiff, in reply to a letter from the defendant dated May 28, asking for still further information, stated that certain proofs which had been furnished were correct, and requested the defendant to inform it at an early date "regarding your intention to pay said claims." To this, so far as appears, the defendant made no reply, and the plaintiff, after waiting till May 18, 1892, nearly a year, brought suit. It would seem from

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one or two of the letters, and from some testimony as to certain interviews between the plaintiff's general agent and the defendant's vice president, that at the dates of those letters and interviews the defendant was investigating the amounts of the losses, but there is nothing to show that the declaration quoted above from the letter of April 13, 1891, was ever qualified or withdrawn. Neither is there anything to show that the defendant ever requested that the matter should be submitted to arbitration, or did anything whatever after receiving the letter of May 29, 1891, from the plaintiff. There was also testimony tending to show that, in interviews between the treasurer of the plaintiff and agents and representatives of the defendant, the latter refused to pay, and denied the liability of the defendant, and never suggested that the loss should be submitted to arbitration.

It is well settled that an insurance company may waive conditions inserted in the policy for its benefit, and that such waiver may be inferred from the conduct of its agents and representatives. *Wainer* v. *Milford Ins. Co.* 153 Mass. 335. *Jones* v. *New York Ins. Co.* 168 Mass. 245, 248. *Hayes* v. *Milford Ins. Co.* 170 Mass. 492. *Lewis* v. *Monmouth Ins. Co.* 52 Maine, 492. *Heaton* v. *Manhattan Ins. Co.* 7 R. I. 502.

The statute providing that failure on the part of an insurance company to do certain things shall constitute a waiver of the right to arbitration does not prescribe the only mode in which a company may waive the right. *Wainer* v. *Milford Ins. Co.*, *ubi supra.* It may be waived orally. *Hutchinson* v. *Liverpool & London & Globe Ins. Co.* 153 Mass. 143, 145.

We think that it would have been competent for the jury to find that the defendant did not rely on the provision in regard to arbitration for the losses, and that the plaintiff was justified in assuming, if it did so assume, that the question was primarily one of liability, and not of amount. The neglect of the defendant to reply to the plaintiff's letter of May 29, 1891, demanding payment, and its subsequent conduct, are circumstances which the jury might find more consistent with this view than with the view that the question was one of amount, especially when considered in connection with the testimony that the defendant had denied its liability, and did not at any time seek to have the matters in dispute submitted to arbitration. A majority

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of the court think that the question of waiver should have been submitted to the jury.

The defendant also contends that performance of the condition, or excuse for its non-performance, should have been alleged. This is true. See Pub. Sts. c. 167, § 2, cl. 10; *Palmer* v. *Sawyer*, 114 Mass. 1, 13. But the declaration was not demurred to, and can be amended. *Exceptions sustained.*

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JOHN M. BURTON *vs.* BURTON STOCK CAR COMPANY.

Suffolk. March 15, 1898. — June 22, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Patent — License — Compensation for Use — Inference of Promise to Pay — Ruling of Auditor — Evidence — Expert — Trial.

Before the granting of a patent an inventor has a qualified property in his invention which is assignable and which may have a value and serve as a consideration for a promise to pay for a transfer and sale.

A license to use an invention may be given before the granting of a patent therefor, and, if acted on by applying the invention to machines or mechanisms constructed before the granting of the patent, will avail to protect the licensee in their use afterwards. Such license, and an implied promise to pay reasonable compensation therefor, may be inferred from circumstances.

Evidence that the plaintiff's brother, who was a director and officer of a corporation employing the plaintiff, was aware of the use by the corporation of the plaintiff's inventions and of his claim for reasonable compensation for their use; that officers of the corporation wrote to and talked with the plaintiff with reference to such use and claim; that directors of the corporation knew that it was using his inventions and that he would claim compensation therefor; that the plaintiff, at the request of officers of the corporation, while still in its employ, assigned to it his patents afterwards obtained for the inventions and was paid the expense of perfecting the inventions and procuring the patents; and that the plaintiff then asserted that he did not waive his right to royalty for the former use of the inventions, but should insist upon future payment, and was assured that his claim would be adjusted later, will warrant the inference, in an action against the corporation, of an implied promise to pay compensation for the use of his inventions, in the absence of evidence that he agreed to license such use gratuitously.

The report of an auditor, in an action to recover compensation for the use of inventions, stated that he ruled that the plaintiff was entitled to recover reasonable

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compensation. He had been asked to rule, as matter of law, that the plaintiff could not recover any compensation for the use of his inventions while he was in the defendant's employ. *Held*, that the ruling was to be taken to mean that the plaintiff was not debarred from recovery on the ground stated; and that, if it meant more than that, it must be treated as a finding of fact, or as a statement that the plaintiff was entitled to recover provided the facts reported would warrant it.

An expert witness is rightly allowed to explain, in an action to recover compensation for the use of inventions, the operation and supposed advantages of the inventions, the letters patent and models of which are before the jury.

It is within the discretion of the judge, in an action to recover compensation for the use of inventions in the construction of stock cars, to permit a witness to give an opinion of the value of the use of such inventions, if he testifies that he has taken out between forty and fifty patents for stock and cattle cars, has made out specifications for these patents, is pretty familiar with the devices used on stock cars, has had ten or twelve years' experience with stock cars outside of his experience as an inventor, has held several offices in the defendant stock car company, and had full charge of the construction of its cars for five or six years, and is familiar with other kinds of stock cars.

That the letters patent for inventions were not actually issued when the defendant used the inventions can be considered by the jury in estimating the weight to be given to the opinion of an expert witness as to the value of such use, even if the defendant did not choose to call the attention of the witness to the fact.

CONTRACT, to recover compensation for the use of patented inventions in the construction of stock or cattle cars. At the trial in the Superior Court, before *Maynard*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

The case was argued at the bar in March, 1898, and afterwards was submitted on briefs to all the justices.

S. J. Elder & R. F. Herrick, for the defendant.

G. L. Huntress, for the plaintiff.

FIELD, C. J. It appears that all the acts done by the defendant in building and rebuilding cars, as charged in the first, second, and sixth counts of the declaration, upon which alone the plaintiff relied, were done between the dates of the several applications for letters patent and the issue of the patents. These counts erroneously averred that these acts were done while the plaintiff was the owner of the letters patent, but no objection is urged on account of the variance.

We have first to consider whether upon the evidence the plaintiff was entitled to go to the jury. It must be treated as settled that before the granting of a patent an inventor has a qualified property in his invention which is assignable, and which

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may have a value, and thus serve as a consideration for a promise to pay for a transfer and sale. *Gayler* v. *Wilder*, 10 How. 477. *Railroad Co.* v. *Trimble*, 10 Wall. 367, 379. *Nicolson Pavement Co.* v. *Jenkins*, 14 Wall. 452. *Hendrie* v. *Sayles*, 98 U. S. 546. *Dalzell* v. *Dueber Watch Case Manuf. Co.* 149 U. S. 315. *Jones* v. *Sewall*, 6 Fisher's Pat. Cas. 343. *Binney* v. *Annan*, 107 Mass. 94. *Somerby* v. *Buntin*, 118 Mass. 279. *Lamson* v. *Martin*, 159 Mass. 557, 562. *Clum* v. *Brewer*, 2 Curt. C. C. 506, 520. This doctrine is not impugned in *Marsh* v. *Nichols*, 128 U. S. 605, or *Durham* v. *Seymour*, 161 U. S. 235, as we understand these decisions.

It follows from this that a license to use an invention may be given before the granting of the patent, and that if acted on by applying the invention to machines or mechanisms constructed before the granting of the patent, it will avail to protect the licensee in their use afterwards. Such license may be inferred from circumstances; and an implied promise to pay reasonable compensation therefor may also be inferred. *McClurg* v. *Kingsland*, 1 How. 202, 208. *United States* v. *Palmer*, 128 U. S. 262. *Solomons* v. *United States*, 137 U. S. 342.

The circumstances of the present case were sufficient to warrant a finding of such license by the plaintiff, and of such implied promise to pay by the defendant, and of the sufficiency of the consideration for such implied promise. The plaintiff was in the employment of the defendant during the period in question. The auditor found that during this time he attended regularly to the duties of his various positions, and did not use either the material or means of the defendant in taking out the letters patent; that he personally paid all the expenses of procuring them, and constantly asserted his right to the personal ownership thereof; and that all of these improvements were used by the defendant on more or less of its cars. It is not now contended that the defendant became the owner of the improvements by virtue of its employment of the plaintiff. *Hapgood* v. *Hewitt*, 119 U. S. 226. *United States* v. *Palmer*, 128 U. S. 262. *Lane & Bodley Co.* v. *Locke*, 150 U. S. 193, 198.

In reference to the matter of compensation, the auditor found "that the plaintiff's brother, who was throughout the time of the plaintiff's employment a director of the defendant corporation,

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and during that period also was consecutively treasurer, superintendent of construction, and assistant general manager of the defendant, was aware of the use by the defendant of the plaintiff's improvements, and of his claim for reasonable compensation for such use; that both he and the president of the defendant corporation wrote to and talked with the plaintiff with reference to such use, and his claim for compensation at various times, and that several of the directors of the defendant knew that the defendant was making use of the plaintiff's improvements, and that the plaintiff would claim compensation therefor." He also found that in 1893 the plaintiff, while still in the defendant's employment, assigned to the defendant all but one of his patents, and was paid therefor by the defendant the expense to which he had been put in perfecting the improvements and procuring the patents; that the plaintiff was requested by certain officers of the defendant so to assign them, "and that the plaintiff at that time asserted to said officers that he did not waive his right to royalty for the former use of his improvements by the defendant, but should insist upon future payment therefor; that the plaintiff was assured by said officers that his claim would be adjusted at a later time." There was no evidence, so far as appears, that the plaintiff agreed to license the use of his improvements gratuitously, and in the absence of such an agreement an implied promise to pay might be inferred from the above facts. Walker, Patents, (3d ed.) § 312.

The expression in the auditor's report, that he rules that the plaintiff is entitled to recover reasonable compensation, is not to be taken as a ruling that, as matter of law, the facts reported necessarily entitled the plaintiff so to recover. He had been asked to rule, as matter of law, that the plaintiff could not recover any compensation for the use of his improvements while he was in the defendant's employment, and the ruling seems to mean that he was not debarred from recovery on the ground stated. If it means more than this, it must be treated as a finding of fact, or perhaps as a statement that the plaintiff is entitled to recover provided the facts reported would warrant it. There was no motion to recommit the report for a more explicit statement by the auditor, and no exception was taken which called special attention to this expression. It becomes unneces-

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sary to consider whether, upon the auditor's report, an express promise was or could be found, or to deal further with the criticisms upon it.

The course of the trial was as follows: "Plaintiff's counsel in opening stated that he would rely upon the auditor's report, and rest upon it as to all matters excepting as to the question of the amount to be paid for the use of the inventions and devices declared upon, and that upon this point he would put in such further evidence as he wished, and then rest, reserving the right, with the court's permission, to introduce evidence in support of the auditor's report at the close of the defendant's case if he so elected."

The auditor's report recites as follows: "The plaintiff introduced evidence tending to show that, by the use of the plaintiff's improvements, the defendant could obtain a royalty of $20 per car for the use of its patents on stock cars, and claimed that the plaintiff should recover of the defendant at that rate for each car used by the defendant, and built under the plaintiff's patents. But I find that the defendant owned many patents which entered, more or less, into the construction of the cars on which the plaintiff's improvements were used, and that the control and use of all these patents gave the defendant a standing and market which could not be gained by the use of the plaintiff's improvements alone; and in fixing the compensation of the plaintiff, I have also taken into consideration the defendant's evidence as to the decreased earning capacity of patent stock cars during the later part of the time covered by the plaintiff's claim." The auditor found that the fair price which the plaintiff was entitled to recover was five dollars per car.

Various questions of the admissibility of the testimony of witnesses at the trial are presented to us. These may be divided into two classes. The first class relates to the explanations which a witness was allowed to give of the operation and supposed advantages of the plaintiff's improvements. The letters patent themselves, with models, were before the jury. The witness was rightly allowed to testify as an expert, so far as the above matters were concerned. The specifications in the letters patent were long, and might not be understood readily by the jury upon an examination or reading of them. The salient fea-

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tures might be brought out by a qualified witness, having the specifications and models before him. We do not see that the witness's answers went beyond what was permissible, or assumed to decide any question of law. No doubt the extent of the inventions patented must be determined by the specifications. The improvements as actually used, and the operation of them in a car in use, might all be explained to the jury, so that their adaptation to be practically used, and their advantages, if any, could be seen and understood. And this, to some extent, might involve an explanation of features not included in the plaintiff's improvements, in order to show how the latter would be available for use in connection with them.

The same witness was then allowed, against the objection and exception of the defendant, to answer the following questions: "What would be a fair compensation for the company to pay for the privilege of constructing cars under patent No. 408,691, the so called hood door?" "What would be a fair compensation for the company to pay for the privilege of constructing cattle cars which should embrace the door and the tilting troughs, as claimed in patent No. 497,945?" He answered, $25 per car.

The jury found for the plaintiff, and assessed damages in the sum of $20,962.46. The exceptions, however, recite as follows: "On the defendant's motion for new trial, the court subsequently ordered this verdict to be set aside, unless the plaintiff would consent to remit so much thereof as exceeded $10,934.60. The plaintiff consented to remit, and the verdict now stands at $10,934.60, which represents five dollars per car, with interest."

As the verdict stands in damages for only the amount found by the auditor, it is improbable that the ruling of the court on the competency of the foregoing questions, and the answer of the witness, if erroneous, did any real harm to the defendant. There is hardly a possibility that the answer of the witness influenced the court in its determination of the amount to be remitted. The exceptions recite: "The witness was then examined as to his qualifications to testify as a patent expert, and testified that he had taken out between forty and fifty patents for stock and cattle cars; that he had sometimes made out spe-

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cifications for these patents; that he was pretty familiar with the devices used on stock cars; that he had had ten or twelve years' experience with stock cars outside of his experience as an inventor; that he had been at different times treasurer, assistant general manager, and superintendent of construction of the defendant company; that he had full charge of the construction of cars for the defendant company from 1882 up to 1887 or 1888; and that he was familiar with other kinds of stock cars." We cannot say that the court was not warranted by the evidence in deciding that the witness was qualified to give an opinion of the value of a license to use the inventions of the plaintiff if the inventions had been actually secured by letters patent at the time when the defendant used them, and if an opinion concerning such value was competent evidence. It is true that the value of a license to use inventions before letters patent have been actually issued, but after applications for letters patent have been made, might not be exactly the same as if the letters patent had been actually issued before the inventions were used, because the defendant would not enjoy the same protection against the use by other persons in the former case as in the latter; (*Rein* v. *Clayton*, 37 Fed. Rep. 354;) but that was a fact in regard to which the witness might have been interrogated by the defendant's counsel, and the objection to the questions by the defendant was not put on the ground that the questions called for an opinion upon the value of the use of the inventions under letters patent, as distinguished from the value of the use under applications for letters patent which afterwards were issued. Inventions are of all sorts, and it is very difficult for a jury to estimate the value of the use of any invention either before or after the issue of letters patent. We are of opinion that, in the discretion of the court, a witness with the qualifications shown in this case might be permitted to give an opinion of the value of the use of inventions relating to stock and cattle cars. *Sturgis* v. *Knapp*, 33 Vt. 486, 531. *Butler* v. *Mehrling*, 15 Ill. 488. *Brady* v. *Brady*, 8 Allen, 101. *Vandine* v. *Burpee*, 13 Met. 288. *Beale* v. *Boston*, 166 Mass. 53, 56. The fact that the letters patent were not actually issued when the defendant used the inventions could be considered by the jury in estimating the weight to be given to the opinion of the witness in its appli-

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cation to the case before them, even if the defendant did not choose to call the attention of the witness to the fact. No evidence appears of any use of the inventions by other persons than the defendant. *Exceptions overruled.*

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MYRON L. DERICK *vs.* WILLIAM R. TAYLOR.

Suffolk. November 19, 1897. — June 23, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Appeal from Municipal Court — Discontinuance.

In an action in the Municipal Court of the city of Boston the judge found for the defendant and judgment was entered in his favor, from which the plaintiff appealed to the Superior Court to be held on the first Monday of July, 1896. On October 14 following, the plaintiff filed a discontinuance. Two days thereafter the defendant moved that the judgment of the Municipal Court be affirmed, on the ground that the plaintiff had failed to prosecute his appeal; and judgment was so affirmed. *Held,* that the appellant had a right to discontinue as he did, and that in entering the appeal and prosecuting it to the discontinuance he prosecuted it with effect as required by the statute.

CONTRACT, brought in the Municipal Court of the city of Boston. The judge having found for the defendant, judgment was entered in his favor, and the plaintiff appealed to the Superior Court to be held on the first Monday of July, 1896. On October 14, 1896, in the Superior Court, the following discontinuance was filed by the plaintiff: "The plaintiff discontinues the above entitled action."

On October 16, 1896, the following prayer was entered by the defendant: "Now comes the defendant and complains that this action was originally brought in the Municipal Court of the city of Boston, and that judgment herein was rendered for the defendant in said Municipal Court for costs; that the plaintiff appealed to this court, as more fully appears from the record of said action, and that the plaintiff has failed to prosecute his said appeal. Wherefore the defendant prays that the judgment of said Municipal Court be affirmed." *Sheldon,* J., affirmed the judgment, and the plaintiff appealed.

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The case was argued at the bar in November, 1897, and afterwards was submitted on briefs to all the justices.

C. W. Rowley, for the plaintiff.

C. F. Choate, Jr., for the defendant.

MORTON, J. At common law the plaintiff could discontinue or become nonsuit as of right at any time before verdict, if not at any time before judgment. *Washburn* v. *Allen*, 77 Maine, 344. *Judge of Probate* v. *Abbot*, 13 N. H. 21. *Benton* v. *Bellows*, 61 N. H. 107. *Wooster* v. *Burr*, 2 Wend. 295. *Merchants' Bank* v. *Schulenberg*, 54 Mich. 49, 54. *Keat* v. *Barker*, 5 Mod. 208. *Outhwaite* v. *Hudson*, 7 Exch. 380. Co. Lit. 139 a. Bac. Abr. Nonsuit (D). 16 Am. & Eng. Encyc. of Law, 723.

This resulted, in part at least, from the fact that anciently, unless the plaintiff continued the process regularly from day to day or from time to time, the proceedings came to a stop; that is, they were discontinued, and he was obliged to begin again. 3 Bl. Com. 296. In part it probably resulted from the objection to compelling a plaintiff to go on with a suit which, for some good reason, he did not wish to go on with, (Co. Lit. 139 a,) and the difficulty of forcing him to appear. Generally speaking he would be mulcted in some form for his failure to proceed, and if he saw fit to submit to that burden rather than go on, he was permitted to do so. In this Commonwealth, however, as well as in Maine and New Hampshire, and possibly in other States, it has been held that a plaintiff cannot discontinue or become nonsuit as of right after the trial has begun, but that he may discontinue or become nonsuit as of right at any time before the trial has begun. *Haskell* v. *Whitney*, 12 Mass. 47. *Locke* v. *Wood*, 16 Mass. 317. *Shaw* v. *Boland*, 15 Gray, 571, 572. *Truro* v. *Atkins*, 122 Mass. 418. *Burbank* v. *Woodward*, 124 Mass. 357. *Kempton* v. *Burgess*, 136 Mass. 192. These cases would seem to be decisive of the case at bar, unless there is a difference between a case originally entered in the Superior Court, and one brought there by appeal from the Municipal Court of Boston. We discover no such difference. Appeals from the Municipal Court of Boston stand on the same footing as appeals from trial justices. Pub. Sts. c. 154, §§ 39, 43. In reference to these it is provided that "the case shall be entered, tried, and determined in the court appealed to in like manner

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as if it had been originally commenced there." Pub. Sts. c. 155, § 28. It is plain therefore, we think, that the plaintiff had the same right to discontinue which he would have had if the case had been entered in the Superior Court originally. The fact that the defendant had judgment in the Municipal Court is immaterial. The appeal vacated the judgment, and opened the whole case to be dealt with in the appellate court as if it had been originally brought there, and the plaintiff could try it or discontinue it as he saw fit. *Fels* v. *Raymond*, 134 Mass. 376. *Ball* v. *Burke*, 11 Cush. 80. *Gardner* v. *Michigan Central Railroad*, 150 U. S. 349. *Merchants' Bank* v. *Schulenberg*, 54 Mich. 49.

The filing of the written discontinuance operated *ex proprio vigore*, and without anything more to discontinue the action. *De Wolf* v. *Sprague Manuf. Co.* 12 R. I. 133. There is no statutory restriction of the right of discontinuance or nonsuit except in the case of set-off. Pub. Sts. c. 168, § 21. In case a second suit is brought for the same cause of action before the costs of the nonsuit or discontinuance have been paid, the court may order it stayed till the costs are paid, and may order it to be dismissed if they are not paid within the time appointed. Pub. Sts. c. 198, § 13.

It is urged, however, that the statute not only requires that the appeal should be duly entered, but also that it should be prosecuted with effect, and that the discontinuance operated as a failure to comply with this provision, and gave the court power on complaint of the adverse party to affirm the former judgment. The appellant entered the appeal, and prosecuted it till the discontinuance, the effect of which was to entitle the appellee to judgment for his costs. The appellant, therefore, prosecuted the appeal with effect. *Hobart* v. *Hilliard*, 11 Pick. 143. If the statute had provided, as that for instance in regard to writs of review does, that the case should be prosecuted to final judgment, it is possible that a discontinuance would operate as a failure to comply with the statute, and that the Superior Court would have power to affirm the former judgment. Pub. Sts. c. 187, § 38. *Hicks* v. *Atkins*, 4 Mass. 103. But that is not the statute. There is an early case, *Little* v. *Holdin*, Quincy, 338, in which, under a statute similar to those now in force, the former judgment was affirmed on complaint,

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because, after entering the appeal, the appellant failed to appear and prosecute it. The case is briefly reported, and does not appear to have been much considered, and the later case of *Hobart* v. *Hilliard*, *ubi supra*, which has been referred to with approval in *Shaw* v. *McIntier*, 5 Allen, 423, and in *Robinson* v. *Masterson*, 136 Mass. 560, decides that what the defendant did in this case constituted a prosecution of the appeal with effect, and is inconsistent with the case reported in Quincy.

The Superior Court had no power, therefore, to affirm the former judgment. The result is that a majority of the court think that the judgment of the Superior Court must be set aside, and judgment entered for the appellee for his costs only.

So ordered.

WILLIAM C. RICHARDSON *vs.* JOHN QUINCY ADAMS & others.

Suffolk. December 6, 1897. — June 23, 1898.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Voluntary Trust — Alleged Cestui que Trust — Ignorance, Mistake, or Fraud — Equity — Evidence.

Where, so far as a declaration of trust goes, nothing can be plainer than the persons for whose benefit the trust is declared, and it is competent for the presiding justice to find on the evidence before him, and for aught that appears he does so find, that the contents of the instrument were known to the settlor and were assented to by him as correctly setting forth the terms of the trust on which the money was paid by him to and was received by the trustee, the contention of a person that the object was to benefit the heirs of A., of whom he was one, and that by ignorance, mistake, or fraud his name was omitted from the list of heirs found in the possession of the settlor, and that the instrument should be reformed so as to admit him as a beneficiary, cannot be maintained.

The terms of a declaration of trust cannot be varied or affected by statements made by the creator of the trust after it has been executed and carried into effect, and in the absence and without the knowledge or assent of the other parties interested.

BILL IN EQUITY, praying that the defendant be ordered to pay over to the plaintiff one seventh of a fund held by him under the following declaration of trust:

"Whereas, I have this day received from George Higgin-

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son, Esq., the sum of forty-three thousand six hundred and ninety-seven dollars and $\frac{58}{100}$ in cash, — Now I hereby declare that I hold the same upon the following trusts:

"First: to invest, hold, and manage the same as a trust fund, and to pay over the net income equally one sixth each to Mary Ann Pratt, Chas. Henry Richardson, Rosa Bella Wilkins, Anna Rebecca Currier, Loring Solomon Richardson, and Joseph Richardson, the only living children of the late Alfred Richardson, to their respective sole and separate use, and on the decease of each to transfer and convey one sixth of the capital of the fund as then invested to the child or children of the one dying (issue then living of any deceased child taking parent's share), and if no issue of the one so dying survive him, then the share of the one so dying is to go equally to the surviving brothers and sisters (issue then living of any deceased brother or sister to take parent's share).

"Second: the trustee at any time acting under this trust is to have the fullest possible power of sale of real and personal estate held at any time under the trust, whether for purpose of change of investment, division, or otherwise, and may invest what was personal estate in real estate and the reverse and shall not be held responsible for anything except wilful default.

"Witness my hand and seal this 19th day of December, A. D. 1881."

The plaintiff is the sole heir at law of Francis A. Richardson, who was a son of Alfred Richardson, and who died in 1862.

The case was reserved by *Knowlton*, J., for the consideration of the full court.

H. S. Milton, (*E. C. Bumpus* with him,) for the plaintiff.

J. Duff, (*S. C. Brackett* with him,) for the defendants.

MORTON, J. The declaration of trust describes the beneficiaries by name, and speaks of them as "the only living children of the late Alfred Richardson," and provides that each is to receive one sixth of the net income during life, and after death one sixth of the capital is to go to his or her children, if any, and in default of issue, then equally to the surviving brothers and sisters. So far as the declaration of trust goes, nothing could be plainer than the persons for whose benefit the trust is declared, and it was competent for the presiding justice to find

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on the evidence before him, and for aught that appears he did so find, that the contents of the instrument were known to Mr. Higginson, and were assented to by him as correctly setting forth the terms of the trust on which the money was paid by him to and was received by the trustee.

The plaintiff contends, however, that the object was to benefit the heirs of Alfred Richardson, of whom he is one, and that by ignorance, or mistake, or fraud his name was omitted from the list of heirs found in the possession of Mr. Higginson, and that the instrument should be reformed so as to admit him as a beneficiary. It is true that there was evidence tending to show that the creator of the trust contemplated the heirs of Richardson as the objects of his bounty; but whether he would have included the plaintiff amongst the beneficiaries if he had known that he was alive, and what his relation to Alfred Richardson was, can be only a matter of conjecture.

The plaintiff had no legal claim upon him, and even if he had known about the plaintiff, it is possible that he still might have chosen to limit his bounty to the living children of Alfred Richardson, and their children and issue, as he has done. It is well settled that an instrument will not be reformed on the ground of mistake, except upon full, clear, and decisive proof of the mistake. *Loud* v. *Barnes*, 154 Mass. 344. *Page* v. *Higgins*, 150 Mass. 27, 30, 31. *German American Ins. Co.* v. *Davis*, 131 Mass. 316. *Stockbridge Iron Co.* v. *Hudson Iron Co.* 107 Mass. 290, 317. *Sawyer* v. *Hovey*, 3 Allen, 331.

This case does not come up to the degree of proof required. There is no evidence of fraud. If there were, the action of the presiding justice has settled the question against the plaintiff.

The letter from Mr. Higginson to the plaintiff was properly excluded.* It was written nearly eight years after the execu-

* This letter, dated March 19, 1889, was as follows: "Your letter of the 15th instant I rec'd a few days ago, but have delayed replying from passing illness. The request you ask is quite beyond *my* reach: the sum of money you refer to was paid, years ago, to a son of your grandfather (as you refer to old Mr. Alfred R.), who was then a clerk in the employ of Mr. John Q. Adams, with a verbal request that the sum should be divided among the legal heirs of old Mr. R. — My interest and agency in its disposal *ended* then, and I must decline taking part in an attempt to give any portion of it a new direction."

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tion of the declaration of trust and the payment of the trust fund. The terms of the declaration of trust could not be varied or affected by statements made by the creator of the trust in the absence of and without the knowledge or assent of the other parties interested, after it had been executed and carried into effect. *Dodge* v. *Nichols*, 5 Allen, 548. *Bill dismissed.*

HOLLINGSWORTH AND VOSE COMPANY *vs.* FOXBOROUGH WATER SUPPLY DISTRICT.

Norfolk. March 24, 1898. — June 23, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Discretion of Presiding Justice — Dismissal of Bill in Equity — Decree — Issues of Fact — Practice.

After the answer and the replication had been filed in a suit in equity, issues of fact were framed for a jury, the judge ruling, on the plaintiff's offer of proof, that the suit could not be maintained. Upon a hearing in this court, the ruling was reversed and the case was ordered to stand for trial, at which the defendant had a verdict, which was set aside on the ground that an article prejudicial to the plaintiff was sent by one of the defendant's counsel, not now in the case, to a newspaper printed in the county for publication, and that a copy containing the article was sent by him, just before the trial, to all the jurors upon the panel "with the design, and for the purpose of improperly influencing, interfering [*sic*], and corrupting the jury in the discharge of their duty." The case was afterwards twice continued, and then the plaintiff filed its motion, upon which the judge entered a decree dismissing the plaintiff's bill without prejudice, with costs to the defendant, and with a provision made under the plaintiff's stipulation, that, if another suit was brought against the defendant for the same cause, the defendant might, if he desired, have a trial by jury upon the issues of fact. *Held*, that the decree, which was made nearly three and a half years after the suit was begun, was in the nature of an exercise of discretion, or a decision of fact upon the facts reported, and that the court could not say that it was not warranted.

The rule that, when questions of fact are determined in equity upon the oral testimony of witnesses, the decision of the justice who saw the witnesses will not be reversed unless it is plainly wrong, applies to questions of discretion decided upon such testimony, as well as to other questions of fact.

BILL IN EQUITY, praying for an injunction against further interference with the plaintiff's water, and for damages. The

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case, having been previously reported 165 Mass. 186, was now reported by *Richardson*, J., for the determination of this court. The facts appear in the opinion.

The case was argued at the bar in March, 1898, and afterwards was submitted on briefs to all the justices.

W. D. Turner, for the defendant.

E. C. Bumpus & H. E. Ware, for the plaintiff.

KNOWLTON, J. In this case there was a decree dismissing the plaintiff's bill without prejudice, with costs to the defendant, and with a provision made under the plaintiff's stipulation, that, if another suit is brought against the defendant for the same cause, the defendant may, if it desires, have a trial by a jury upon the issues of fact. The question is whether the decree is erroneous.

In *Kempton* v. *Burgess*, 136 Mass. 192, it is said by Chief Justice Morton, in giving the opinion, that in suits in equity in which the plaintiff brings the bill for his sole benefit, and no other person is interested in its maintenance, "it is a matter of course to permit a plaintiff to dismiss his bill at any time before a hearing, upon payment of the costs." It is also said in that case, and it is well settled law, that a decree dismissing a bill in equity for want of prosecution, and without a hearing upon the merits, is no bar to a new suit. Such a dismissal is in fact without prejudice, and it is a safe and convenient practice so to state in the decree. *Bigelow* v. *Winsor*, 1 Gray, 299, 301. *Kempton* v. *Burgess*, 136 Mass. 192. The plaintiff can have his bill dismissed, as a matter of absolute right, without a decision upon the merits, if no decree or order has been entered in the case. But upon his motion to dismiss after an order or decree has been entered, it is the practice of the court to exercise its discretion in his favor, if nothing has been done which materially affects the rights or situation of the parties so as to render it inequitable to leave the defendant without a final adjudication upon the merits. In *Chicago & Alton Railroad* v. *Union Rolling Mill Co.* 109 U. S. 702, 713, it is said that the general rule, that "a complainant in an original bill has the right at any time, upon payment of costs, to dismiss his bill, . . . is subject to a distinct and well settled exception, namely, that after a decree, whether final or interlocutory, has been made, by

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which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant." In *Saylor's appeal*, 39 Penn. St. 495, the law is stated as follows: "It is the general rule in a court of chancery that a complainant may move to dismiss his own bill with costs, at any time before the decree, and it is a matter of course to permit him to dismiss it; . . . and even upon the hearing of the cause, if the court has merely directed an issue, the plaintiff may, before the trial of the issue, obtain an order to dismiss the bill with costs, because the directing of an issue is only to satisfy the conscience of the court preparatory to its giving judgment. But the rule is not so after the issue has been tried and determined for the defendant. The plaintiff cannot then move to dismiss, because the defendant is then entitled to have the cause set down for a hearing in order to obtain a formal dismissal." See also *Nashua & Lowell Railroad* v. *Boston & Lowell Railroad*, 164 Mass. 222, 224; *Carrington* v. *Holly*, Dickens, 280; *Curtis* v. *Lloyd*, 4 Myl. & Cr. 194; *Booth* v. *Leycester*, 1 Keen, 247, 255; *Pickett* v. *Loggon*, 14 Ves. 215; *American Bell Telephone Co.* v. *Western Union Telegraph Co.* 21 U. S. App. 627; *Purdy* v. *Henslee*, 97 Ill. 389; *Reilly* v. *Reilly*, 139 Ill. 180.

The general rule seems to be that the court, on the plaintiff's motion, will dismiss his bill on payment of costs as for want of prosecution, unless something has been done in the case which entitles the defendant, on equitable grounds, to have the suit finally disposed of on the merits. If there have been decrees or other proceedings whereby a defendant's situation has been changed, and he has acquired rights which did not exist, or which had not been determined when the suit was brought, and which render it equitable that these rights should be fully secured by further proceedings in the cause, the court, at the defendant's request, will retain it for a decision upon the merits; but when nothing has been done by the court or the parties that changes the position in which they were when the suit was begun, the rule is different. It has often expressly been held that in order to prevent a decree allowing a dismissal of the plaintiff's bill upon his motion, on payment of costs, the injury

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to the defendant from a dismissal must be something more than the incidental annoyance of a second suit for the same cause. *Stevens* v. *Railroad Co.* 4 Fed. Rep. 97. *Bank of South Carolina* v. *Rose*, 1 Rich. Eq. 292, 294. *Electrical Accumulator Co.* v. *Brush Electric Co.* 44 Fed. Rep. 602, 605. *Detroit* v. *Detroit City Railway*, 55 Fed. Rep. 569. This seems to be the rule deducible from all the cases. Ordinarily the payment of costs is treated as full indemnity to the defendant for bringing against him a suit in which he prevails.

In the present case the decree in question was made nearly three and a half years after the suit was begun. After the answer and the replication had been filed, issues of fact were framed for a jury. At the trial of the issues the judge ruled, on the plaintiff's offer of proof, that the suit could not be maintained, and reported the case to this court. Upon hearing in this court, reported 165 Mass. 186, the ruling was reversed, and the case was ordered to stand for trial. A trial was subsequently had, and a verdict was rendered for the defendant. This verdict was set aside on the ground that an article prejudicial to the plaintiff was sent by one of the defendant's counsel, not now appearing in the case, to a newspaper printed in the county for publication, and that a copy of the newspaper containing the article was sent by him, just before the trial, to all the jurors upon the panel, "with the design, and for the purpose of improperly influencing, interfering [*sic*], and corrupting the jury in the discharge of their duty." The case was afterwards twice continued, and then the plaintiff filed its motion to dismiss without prejudice, upon which the decree in question was made. Other motions were filed which are immaterial, as no order affecting the present rights of the parties was made upon any of them.

The result of all this litigation, up to the time of making the decree, was to leave the parties in precisely the same position as they were in when the pleadings had been completed and issues had been framed for trial by jury. Nothing had been accomplished, and no rights had been acquired by the defendant after the issues were framed. Each of the parties had doubtless learned something of the matters relied upon by the other. But so far as appears, the information so obtained would be as valu-

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able in the trial of a new suit for the same cause as in the trial of this one. If this were an action at law, there is no doubt that the plaintiff would have the same right to become nonsuit as it would have had before the first trial. Looking at all the proceedings since the issues were first framed, we do not see that the defendant is legally or equitably in any better position by reason of them. Certainly the circulation of the article in the newspaper among the people of the county, and the obtaining of a verdict which may have come from the use of an improper influence, might prejudice the plaintiff in a subsequent trial of the case, and might be a reason for allowing the plaintiff to discontinue its suit without prejudice to its right to bring another for the same cause. In balancing the equities we cannot leave out of consideration the grounds on which the verdict for the defendant was set aside.

Although an appeal in a suit in equity brings up for revision questions of discretion, as well as other questions of fact, it often happens under our practice that the judge who sits at the trial has opportunities to determine such questions that cannot be given to a court which deals only with the printed record. When questions of fact are determined in equity upon the oral testimony of witnesses, it is the law in this court that the decision of the judge who saw the witnesses will not be reversed unless it is plainly wrong. This rule applies to questions of discretion decided upon such testimony, as well as to other questions of fact. In the present case the testimony is not given, but we have from the judge a report of the facts upon which he made his decree. His decree was in the nature of an exercise of discretion, or a decision of fact upon the facts reported. If the decision was warranted by the facts reported, the decree should stand. We cannot say that it was not warranted.

Decree affirmed.

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ATTORNEY GENERAL *vs.* BAY STATE BENEFICIARY ASSOCIATION. H. C. BLISS & another, receivers, petitioners.

Suffolk. May 16, 1898. — June 23, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Insurance on the Assessment Plan — Construction of Policy — Disability caused by Sickness — Statute.

In each of the policies issued after January 11, 1892, by a beneficiary association incorporated under general law, was the following: "In the event of said member becoming totally and permanently disabled, and the determining of such disability by the medical director and board of directors of said association, there shall be paid to said member at the option of said board, if he shall so request in writing at any time while this policy is in full force, upon the surrender to said association of this policy and the cancellation of the same in full discharge and settlement of all claims under this contract, the sum of $." The amount written in the blank space was one half the amount of the total policy risk. Numerous proofs were filed with the receivers by policy holders as claimants for permanent and total disability prior to the filing of the bill for the appointment of receivers. In most of these cases the alleged disability arose from sickness, and in none of them did the directors vote or determine to exercise their option in favor of the payment or allowance of the claim. *Held*, that the corporation had no power, since the enactment of St. 1890, c. 421, to engage in the business of insurance against losses in cases where the disability might arise from sickness, that the claimants had no additional right by reason of disability to share in the assets of the corporation, and that the same answers applied to a claim of an intervening petitioner, which arose upon an agreement of the defendant to assume the liability of another association under a certificate issued to the claimant containing a provision similar to the above but different from it in making the liability to pay upon demand in cases of total disability absolute instead of optional with the director.

PETITION IN EQUITY, by the receivers of the defendant association, praying for the instructions of the court as to their duties. Hearing before *Lathrop*, J., who reserved the case upon the pleadings and the intervening petition of one James A. Shaw for the consideration of the full court. The facts appear in the opinion.

H. C. Bliss, for the receivers.

H. V. Cunningham, for James A. Shaw.

KNOWLTON, J. The Bay State Beneficiary Association was organized as a corporation under the general laws on June 2, 1881, "for the purpose of rendering pecuniary aid to the families of

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deceased members, their heirs and assigns." The affairs of the corporation are now being settled by receivers appointed by this court.

The laws applicable to such corporations were embodied in chapter 115 of the Public Statutes. Another act relating to the subject was the St. 1882, c. 195, which has been repealed and superseded by later legislation. The St. 1885, c. 183, was a revision and enlargement of the laws relating to insurance on the assessment plan, and the St. 1890, c. 421, is a material modification of the previously existing statutes.

In each of the policies issued after January 11, 1892, is a provision as follows: "In the event of said member becoming totally and permanently disabled, and the determining of such disability by the medical director and board of directors of said association, there shall be paid to said member at the option of said board, if he shall so request in writing at any time while this policy is in full force, upon the surrender to said association of this policy and the cancellation of the same in full discharge and settlement of all claims under this contract, the sum of $." The amount written in the blank space as the sum to be paid to said member, is one half the amount of the total policy risk. Numerous proofs have been filed with the receivers by policy holders claiming benefits on account of permanent and total disability prior to the filing of the bill for the appointment of receivers. In most of these cases the alleged disability arose from sickness, and in none of them did the directors vote or determine to exercise their option in favor of the payment or allowance of the claim. The receivers ask the instruction of the court upon the question "whether said corporation had power, subsequent to the enactment of chapter 421 of the Acts of 1890, to engage in the business of insurance against losses in cases where the disability might arise from sickness."

The St. of 1885, c. 183, § 1, defined insurance on the assessment plan in such a way as to include all contracts for benefits made by this corporation under its charter, and divided contracts for such insurance into two classes, contracts of life insurance and contracts of casualty insurance. Casualty insurance included all contracts where benefits were to accrue through physical disability from accident or from sickness of the insured, as well as

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through accidental death. Sections 1 and 2, as well as other parts of the act, limited the right to make contracts of insurance on the assessment plan to corporations acting under the provisions of this statute. So long as this statute was in force there was nothing to prevent the organization of corporations for the purpose of issuing contracts of casualty insurance which would give benefits for disability arising from sickness as well as accident. Whether the charter of this corporation is broad enough to authorize the making of such contracts, we need not consider.

The St. 1890, c. 421, § 1, which takes the place of § 1 of the statute last considered, changes the definition of casualty insurance by including in it only cases where the benefit is to accrue through the accidental death of the insured, or his physical disability arising from accident, and it makes no provision for insurance by such company against disability arising from sickness. It also contains a provision in regard to insurance on the assessment plan, that "such business shall be lawful only as defined and permitted by this act." It follows that the previously existing authority to corporations to insure against disability arising from sickness was taken away by the St. 1890, c. 421, which repealed and superseded the provisions of the St. 1885, c. 183, on this subject. The first question of the receivers must be answered in the negative.

The answer to this question disposes of the second question also, which was "whether said claimants, upon proof of total and permanent disability, have a right to share in any of the assets of said association, and on what conditions in cases where the directors did not exercise their option either favorably or unfavorably as to the payment of said claims." These claimants have no additional right by reason of their disability to share in any of the assets of the corporation.

The claim of James A. Shaw under his intervening petition arises upon an agreement of the corporation to assume the liability of the York Mutual Aid Association under a certificate issued to the claimant containing a provision similar to that above quoted, but differing from it in making the liability of the company to pay upon demand in cases of total disability absolute instead of optional with the directors. The answers already

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given apply to this claim as well as to the others. The argument of the claimant that the corporation is estopped to deny its liability in this proceeding, because of the similar provision contained in the policies issued by it after January 11, 1892, cannot prevail. Without intimating that there would be such an estoppel if the provision had been like that in the claimant's certificate, it is enough to say that it did not purport to bind anybody. It merely recognized the right of the company to take up and cancel a certificate by paying one half the amount payable in case of death, if a holder who had become totally disabled requested it in writing and if the directors chose to do it. If, in reference to the risk under the liability for death, it seemed expedient to the directors to procure a cancellation of the policy, and if both parties agreed upon the terms, they could do it as well without such a provision as with it. This claim is disallowed.

*Ordered accordingly.**

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* A similar decision was made in Suffolk, June 23, 1898, in the case of

ATTORNEY GENERAL *vs.* BERKSHIRE HEALTH AND ACCIDENT ASSOCIATION.

INFORMATION, filed March 4, 1898, under St. 1890, c. 421, § 13, as amended by St. 1896, c. 515, § 6. The case was reserved by *Barker*, J., on the petition, answer, and an agreed statement of facts, upon the only question of law presented and argued by counsel, "whether the defendant corporation is authorized, by the existing statutes of the Commonwealth, by the issuing of certificates or otherwise to provide for the payment of a weekly benefit to its members in cases of disability from illness, which illness is not the result of accident."

B. N. Johnson & R. P. Clapp, (*W. O. Underwood* with them,) for the defendant.

H. M. Knowlton, Attorney General, & *A. W. DeGoosh*, Assistant Attorney General, for the Commonwealth.

KNOWLTON, J. This case is governed by the case of *Attorney General* v. *Bay State Beneficiary Association*, *ante*, 455. The St. of 1890, c. 421, took away the previously existing right of the respondent corporation to issue certificates providing for the payment of a weekly benefit to its members in cases of disability resulting from illness which was not caused by accident.

Decree accordingly.

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COMMONWEALTH *vs.* DOMINIQUE KRATHOFSKI.

Hampden. May 16, 1898. — June 23, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Venires for Grand Jurors — Decision of Aldermen as to Absence or Sickness — Amendment by Constable of Return on Venire.

The provision in Pub. Sts. c. 213, § 1, that venires for grand jurors must be issued not less than seven nor more than thirty days before the commencement of the first term of the Superior Court in each year, means the first term for the transaction of criminal business.

The provisions of Pub. Sts. c. 170, § 18, that, if a person drawn as a juror is exempt by law or is unable by reason of sickness or absence from home to attend as a juror, his name is to be returned into the box and another drawn in his stead, necessarily imply that the decision of the aldermen is to be made upon the spot, and that such decision is final; and, even if the decision honestly made was wrong, no objection is open on this ground.

It seems that a constable may be rightly allowed to amend his return on a venire issued for grand jurors.

INDICTMENT, for murder. The hearing was on a special plea and the replication thereto, before *Hopkins*, J., who overruled the same, and the defendant alleged exceptions. The facts appear in the opinion.

T. W. Kenefick & J. T. Moriarty, for the defendant.

C. L. Gardner, District Attorney, for the Commonwealth.

ALLEN, J. The prisoner's first objection is that, by Pub. Sts. c. 213, § 1, the venires for grand jurors must be issued not less than seven nor more than thirty days before the commencement of the first term of the Superior Court, in each year, and that the venires were not issued till after a term for the transaction of civil business had been held. It is provided for Hampden County in St. 1885, c. 27, that "terms of said court for criminal business shall be held at said Springfield on the first Monday of May, the fourth Monday of September, and the third Monday of December. The grand jury for Hampden County shall assemble at the terms of the court hereby established." This is a direct implication that they are not to attend at any other term, and therefore they need not be summoned except for the criminal terms. It is quite clear that the requirement as to the time of

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issuing the venires relates only to the criminal terms. *Commonwealth* v. *Intoxicating Liquors*, 13 Allen, 561. *Commonwealth* v. *Intoxicating Liquors*, 107 Mass. 386. These cases show that the construction of Pub. Sts. c. 213, § 1, would probably be the same, even without the assistance of St. 1885, c. 27. We have no occasion to consider whether in any case a non-compliance with the directions of the statute would avail a defendant by way of objection. See 1 Bish. Crim. Proc. § 875, and cases cited.

The only other objection presented in argument is that one of the grand jurors from Holyoke was illegally drawn. The venire called for four grand jurors from Holyoke. The records of the board of aldermen, which were put in evidence, showed that four names were drawn, to wit, Stedman, Borthwick, Moore, and Fitzpatrick; that prior to the drawing of the name of Fitzpatrick the name of Brennan was drawn, and that, upon the statement of a member of the board that Brennan had removed from Holyoke, the president directed another drawing, and the name of Fitzpatrick was drawn. By Pub. Sts. c. 170, § 18, if a person so drawn is exempt by law, or is unable by reason of sickness or absence from home to attend as a juror, his name is to be returned into the box, and another drawn in his stead. This necessarily implies that the decision is to be made upon the spot, and that such decision is final. In this case, Brennan was rejected as a non-resident. Only inhabitants and voters can be placed on the jury list. Pub. Sts. c. 170, §§ 1–6. If the decision of the aldermen, honestly made, had been wrong, no objection on this ground would be open to the prisoner. *Commonwealth* v. *Brown*, 147 Mass. 585, 593. But from the testimony of Brennan it would seem that their decision was right. No other objection against Fitzpatrick is suggested, except that Brennan's name was drawn first.

Both of the above objections are untenable. The other exception taken was not insisted on, it being entirely clear that the constable of East Longmeadow was rightly allowed to amend his return, if indeed any amendment was necessary. *Commonwealth* v. *Parker*, 2 Pick. 550.

Exceptions overruled.

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COMMONWEALTH *vs.* ALFRED C. WILLIAMS.

Essex. May 16, 1898. — June 23, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Homicide — Evidence.

At the trial of an indictment for murder, it appeared that early in the morning of a certain day the house of the man alleged to have been murdered was burned down, and the remains of a human body of uncertain sex were found in the ruins. There was no identification of the body otherwise than by the place where it was found, by the fact that the man had been seen at his house the previous evening and was seen no more, and by a clasp of a pocket-book like his found near the remains; and there was no direct evidence of the commission of a crime. *Held*, that the other evidence in the case, relating mainly to the appearance and conduct of the defendant after the fire, to the articles found in his room, and to the habits of the missing man, taken with the facts above mentioned, warranted the jury in finding it proved beyond a reasonable doubt that the man was murdered, and was murdered by the defendant.

At the trial of an indictment for the murder, in July, of a man whose house was burned down, the remains of a human body supposed to be his being found in the ruins, it appeared that officers who searched the defendant's room found two secreted twenty-dollar gold pieces; and that the missing man had no bank account, but apparently kept his money as he earned it, except the very small sums which he had to spend for his living. *Held*, that evidence that the man was paid one twenty-dollar gold piece in December preceding the fire, that he exhibited four such pieces in the following March, and exchanged one for paper money, and that he had three such pieces at Easter and in May, was not open to the objection of remoteness, having regard to his habits.

A person who was under arrest upon suspicion of robbery and murder, and whose room had been searched by an officer and bloody clothing and two secreted gold pieces found there, and who previously had told of having been assaulted and having found some money, was asked by the officer, "How is it that that blood came on your drawers?" to which he replied, "This morning when I came into my room my hands were all bloody and I took the first thing that I could find to wipe them off, and that was the pair of drawers." He was then asked by the officer, who exhibited the gold pieces, "Do you know where I got those?" and answered in the negative. The officer then said, "I got them up in your room under the carpet on the floor"; to which he replied, "I know it, I put them there." *Held*, upon an indictment for murder, that the evidence of what he said to the officer was admissible.

INDICTMENT, for the murder of John Gallo, on July 28, 1897, at Lynnfield. At the trial in the Superior Court, before *Dunbar* and *Braley*, JJ., the jury returned a verdict of guilty; and the defendant alleged exceptions, which appear in the opinion.

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C. A. Sayward & N. N. Jones, for the defendant.

A. P. White, District Attorney, for the Commonwealth.

HOLMES, J. Evidence which is colorless taken by itself, which establishes neither a constituent nor a fact pointing by inference to a constituent of a crime, may be made significant by other evidence, and so may be made admissible. It need not be self-justifying without regard to the other circumstances proved. *Commonwealth* v. *O'Neil*, 169 Mass. 394. What is true of any part of the evidence is true with regard to the whole of it. And it also is true, in this Commonwealth at least, that there is no one dominant part of the case which must be proved as directly as possible in the nature of things before evidence of a remoter kind is admissible to connect the defendant with the supposed crime. No doubt the jury ought to be very sure that a crime has been committed before they convict a person of having committed it. But even upon an indictment for murder, the evidence of the death as well as of every other material fact may be insufficient singly, and yet the evidence taken as a whole may leave no reasonable doubt of the crime or of the defendant's guilt. The facts in a circle support one another, when if any one were withdrawn they all would fall to the ground. *State* v. *Williams*, 7 Jones, (N. C.) 446. *Campbell* v. *People*, 159 Ill. 9. *State* v. *Martin*, 47 S. C. 67. *Commonwealth* v. *Johnson*, 162 Penn. St. 63. *United States* v. *Williams*, 1 Cliff. 5, 21. *Laughlin* v. *Commonwealth*, 37 S. W. R. 590; *S. C.* 18 Ky. Law Rep. 640. See *Commonwealth* v. *Webster*, 5 Cush. 295, 310, and more especially Bemis's Report of the Trial, 479, 480. Other cases are collected in 7 Am. & Eng. Encyc. of Law, (2d ed.) 863, 864, *sub voc.* "Corpus Delicti."

The case at bar is a striking example and proof of the foregoing general rules. Early in the morning of July 28, 1897, the house of Gallo, the man alleged to have been murdered, was burned down. The remains of a human body of uncertain sex were found in the ruins. If we leave on one side the evidence bearing on the other issues of the case, there was no identification of the body otherwise than by the place where it was found, by the fact that Gallo had been seen at his house the previous evening and was seen no more, and by a clasp of a pocket-book like Gallo's found near the remains. There was

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no direct evidence of the commission of a crime. Yet the other evidence, taken with the facts just mentioned, warranted the jury in finding it proved beyond a reasonable doubt that Gallo was murdered, and was murdered by the defendant.

At about a quarter past four in the morning, near the time that the fire was discovered, the defendant appeared two and seven tenths miles away, at the Carleton House in the town of Wakefield, heated, flushed, and excited, with blood stains upon him, his hat gone and his clothing disturbed, and told a story which subsequent investigation did not confirm, that he had been attacked and robbed of a gold watch by the side of a pond which he naturally would have passed in coming from Gallo's house. Tracks of a running man were found going from Gallo's house in the direction of a path leading to the pond. On the day before the fire, the defendant was penniless and wanting money to go to Klondike. In telling of the robbery he said that he had sent for seventy-five dollars and was glad he had not received it. At nine o'clock on the same morning he said that he sent for two hundred dollars and expected to hear before Saturday. At ten o'clock he produced a roll of bills, from which he took one of five dollars and spent the greater part of it. On the evening of the same day, after telling different stories to the police, when about to be searched, he produced a roll of five ten-dollar and four five-dollar bills, which at first he said his brother had sent to him by mail, and then declared that he found by the pond where he was assaulted as he was coming down. Upon an officer pressing him further, he turned very white, perspired, and hardly could speak for a time, but persisted that he found the money as he said. Then the officers searched his room and found very bloody clothing and two secreted twenty-dollar gold pieces, of which at first the defendant denied knowledge, but which afterwards he said he found with the rest. It appeared that Gallo had had three twenty-dollar gold pieces, and some time before had been paid one hundred and nine dollars mostly in ten and five dollar bills. Gallo seemingly had no bank account, and seems to have kept his money as he earned it, except the very small sums which he had to spend for his living. With reference to the question whether a crime had been committed, it should be added that

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the kerosene can usually kept by Gallo in another place was found in the bedroom, between the body and the place of the bed; and although we are not attempting to state details, it should be noticed as possibly significant that the defendant, when told that the Italian's shanty was burned and that he was burned in it, answered, "Was he all burned up?"

The outline which we have given of the case seems to us enough to show that it could not have been taken from the jury, and that a request to direct a verdict for the defendant properly was overruled. It only remains to consider exceptions taken to the admission of evidence.

The first four exceptions were respectively to evidence that Gallo was paid one twenty-dollar gold piece in December, 1896, that he exhibited four such pieces in March, 1897, and exchanged one for paper money, and that he had three such pieces at Easter and in May. The objection is that the times referred to were too remote from the date of the fire. But when the habits of Gallo as we have stated them are taken into account, there is every probability that money which he had six months earlier he still would have, except so far as it was needed for his very limited expenditures. It is altogether probable that the gold pieces which he had in March were the same which he had in May. No argument was attempted on the ground that the money which Gallo had was not shown by earmarks to be the same which was afterwards in the hands of the defendant. *Commonwealth* v. *O'Neil*, 169 Mass. 394, 397.

The two remaining exceptions are to the admission of evidence of what the defendant said while in the custody of the officers.* These were not argued orally, and were understood to be waived. But as the point is raised in the brief, and *Bram* v. *United States*, 168 U. S. 532, is cited, we may say that we see nothing to render the evidence inadmissible by the law of this

* This evidence was as follows. The defendant was asked by one of the officers, "How is it that that blood came on your drawers?" to which he replied, "This morning when I came into my room my hands were all bloody and I took the first thing that I could find to wipe them off, and that was the pair of drawers." He was then asked by the officer, who exhibited the gold pieces, "Do you know where I got them?" and answered in the negative. The officer then said, "I got them in your room under the carpet on the floor"; to which he replied, "I know it, I put them there."

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Commonwealth, either on the ground that what was said was not said voluntarily, or that the *corpus delicti* was not proved. As to the former ground, see *Commonwealth* v. *Bond*, 170 Mass. 41; *Commonwealth* v. *Preece*, 140 Mass. 276; *Commonwealth* v. *Cuffee*, 108 Mass. 285. As to the latter, if there be any such condition attached to the admissibility of a prisoner's own statement, the jury were warranted by the other evidence in finding that Gallo had been murdered. See *United States* v. *Williams*, 1 Cliff. 5, 21; 6 Am. & Eng. Encyc. of Law, (2d ed.) 581, 582, *sub voc.* "Confessions." *Exceptions overruled.*

EDWIN V. GAGE *vs.* ELBRIDGE G. WOOD & others.

Essex. May 19, 1898. — June 23, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Will — "Ground Rents" — Termination of Trust.

Where trustees are directed by will to convey, at the decease of the testator's wife, "all property held by them, not herein otherwise disposed of, to my heirs at law *per stirpes*," certain ground rents accruing from real estate leased in 1854 for ninety-nine years then next ensuing, and at the end of the term renewable forever, must be regarded as a part of the property so to be conveyed, especially when that conclusion is favored by a consideration of the different portions of the will.

CONTRACT OR TORT. The first count was for money had and received, and the second was for conversion. The action being against Elbridge G. Wood, trustee under the will of Edmund Gage, Lydia W. Gage, the widow, who was also a trustee, having deceased, Clara G. Eaton, and Rebecca A. Covelle, who was also a trustee, were, on motion, made parties defendant. The plaintiff was the residuary legatee under the will. The case was submitted to the Superior Court, and, after judgment by *Sheldon*, J. that the net sum received from ground rents be paid by the defendant Wood to the plaintiff, and to the defendants Clara G. Eaton and Rebecca A. Covelle, in equal shares, to this court, on appeal, upon agreed facts, the nature of which appears in the opinion.

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C. W. Bartlett & E. R. Anderson, for the plaintiff.

H. E. Bartlett & J. H. Pearl, for Clara G. Eaton and Rebecca A. Covelle.

KNOWLTON, J. The decision of this case depends upon the meaning of items four and five of the will of Edmund Gage. By item four he gave sundry stocks, bonds, and deposits in saving banks to trustees, to use the income for the support of his widow and his daughter Martha C. Gage, and after the death of this daughter to give the deposit in one savings bank to one of his two other daughters, and the deposit in another savings bank to the other, and a one thousand dollar bond to his son, and to pay the income of the balance to his widow during her life. At the decease of the widow, the deposits in two savings banks are specifically disposed of by the will, and then follows this provision: "At the decease of my said wife, to convey all property held by them, not herein otherwise disposed of, to my heirs at law *per stirpes*. Grants of ground rents to my daughters Rebecca A. and Clara G. are for the several terms of their natural lives." Item five gives to his son, the plaintiff in this action, all the rest, residue, and remainder of his estate. At the time of the decease of the widow, the trustees had in their hands sixteen shares of the stock of the First National Bank of Haverhill, twenty shares of stock of the Old Colony Railroad Company, and a one thousand dollar bond of the Cincinnati and Indiana Railroad Company, all of which have been divided between the plaintiff and his two sisters, who are the adverse claimants in this case, they three being the only heirs at law of the testator. The testator at the time of his decease was the owner of real estate in Cincinnati, Ohio, leased to one Kellogg by an indenture dated January 13, 1854, for the term of ninety-nine years then next ensuing, and at the end of the term renewable forever. In item four of the will he described the first item of property given to the trustees as "five hundred and thirty dollars per annum from my Cincinnati ground rents." This property they continued to hold and use with the other property, according to the directions of the will, until the decease of the widow.

The question is, whether these rents, after the death of the widow, were a part of the property described in item four of the

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will, which was to be conveyed by the trustees to the testator's heirs at law, or whether they were given only for an indeterminate period which ended at the death of the widow, so that the amounts subsequently accruing passed to the plaintiff as residuary legatee.

By item two he gave to his daughter Rebecca four hundred and fifty dollars per annum from his Cincinnati ground rents, and by item three he gave to his daughter Clara G. a like sum from the same source. Considering the different portions of the will together, we are of opinion that the testator used the expression "five hundred and thirty dollars per annum from my Cincinnati ground rents," and the other similar expressions, to designate as a part of his property to be separated from the rest a certain annual income from ground rents for such length of time as the rents should be paid. By the sentence above quoted he limited the grants to his two daughters to a life estate in this property. In this limitation there is an implication that the expression used in the gift to the trustees without a limitation includes the rents to the specified amount so long as they are paid. The gift of these ground rents to the trustees, like the gifts of the stocks, bonds, and savings bank deposits, is absolute, and not for a limited time. After making payments as directed to the time of the wife's decease, they had in their hands this right to the rents, as they had other property which remained undisposed of. We are of opinion that these rents are a part of the property to be conveyed to the testator's heirs at law.

Order of Superior Court affirmed.

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STEPHEN C. NORTHRUP *vs.* GEORGE E. C. BUFFINGTON & another.

Suffolk. May 19, 1898. — June 23, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Wagering Contract — Action.

Money paid by A. to B. in transactions which are found to be wagers upon the future market price of certain stocks, none of which were, or were intended to be, bought, sold, or delivered, and money received by B. as the proceeds of the transactions when closed out by A.'s orders cannot be recovered in an action by A. against B.; and the fact that B. was doing a commission business for C., who was a stockbroker, is immaterial.

CONTRACT. The original declaration contained two counts, each for money had and received; and was amended by the addition of thirteen counts for the recovery of amounts paid on alleged purchases of stock, and of the profits resulting from the transactions.

The case was referred to an auditor, who reported as follows:

"At the hearing, the plaintiff abandoned the first two counts, and proceeded to trial upon the remaining counts only.

"The defendants, at the dates named in the declaration, were copartners, as alleged therein, in business at No. 4 State Street, Boston, as stockbrokers, doing a commission business for Doran, Wright, and Company, also stockbrokers in New York and Boston.

"This commission business consisted in taking orders in Boston for the purchase or sale of stocks on a margin, transmitting the orders and the margins, less a small commission upon each share so received to other brokerage houses, giving the customer a ticket; a copy of one of these is hereto annexed, stating the stock bought or sold, the price, and the amount of margin paid. If the market price of the stock rose or receded the customer would give the defendants orders to 'close out' the transaction, which meant paying the customer the difference in case of a rise in the market price, and receiving from the customer the difference in case the market price receded.

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"I find that the several transactions set forth in the plaintiff's amendment to his declaration took place as therein alleged, except that the sums alleged to have been paid the defendants by the plaintiff on account of the stocks purchased were paid as a margin to protect the defendants in such purchases, and not on account of an actual purchase of stock. I find that, in each of said transactions, there was no intention on the part of either party to actually purchase, sell, or deliver any of the stocks, and none were actually sold, purchased, or delivered; that each was a wagering contract, a wager upon the future market price of the particular stock alleged to have been purchased, and neither party expected to account for anything except the difference in such market prices, and that all the contracts or transactions declared on were therefore against public policy, illegal, and void.

"I therefore find and report for the defendants upon each and every count and cause of action set forth in the plaintiff's declaration."

The material portion of the ticket referred to in the auditor's report was as follows:

"The G. E. C. Buffington Co., brokers, 4 State Street, Room 1. Stocks, bonds, grain, provisions, and oil bought, sold, and carried on margin, *without interest.*

"Mr. S. C. Northrup. Boston, 4/21, 1890.

"In obedience to your order, we have this day bought for your account and risk, upon margin, subject to the usages of this office governing margin transactions.

Shares.	Description.	Price.	Deposited.
10	Sug.	71	10
		4/25	10
	Closed 75	$60 due.	

"It is hereby mutually agreed by and between the persons receiving this ticket and the issuers that the contract named therein shall be closed when the price reaches 69 unless remargined before said price is reached.

"We do not solicit and will not receive any business except with the understanding that actual delivery of property bought or sold on orders is in all cases contemplated and understood."

At the trial in the Superior Court, before *Sheldon*, J., the

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plaintiff put in evidence the auditor's report, and also a memorandum, which is referred to as the "ticket" in the report. The defendants offered no evidence. The plaintiff then requested the judge to rule as follows:

"1. If the jury find that the transactions stated in the plaintiff's counts, 3 to 15 inclusive, occurred as stated in the auditor's report, then the jury must find for the plaintiff for the sum claimed in said counts. 2. The facts stated in the auditor's report show no wager between the plaintiff and the defendants. 3. If the jury find the facts to be as stated in the auditor's report, then the defendants were not affected financially by the changes in prices of the stocks dealt in by the plaintiff. 4. If the jury find that the defendants were not affected financially by the change in prices of stocks dealt in, and that the plaintiff made no wager with the defendants, then the defendants can take no advantage in this case of the illegality of any contracts made by the plaintiff and third parties, and use the same as a defence in this suit." But the judge declined so to rule.

The jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

J. L. McLean, for the plaintiff.

F. Burke, for the defendants.

MORTON, J. The only evidence before the court and jury was the auditor's report, and the ticket referred to in it. The auditor found that each transaction set out in the amended declaration, which was what the plaintiff relied on, was a wager upon the future market price of the particular stock alleged to have been purchased, that neither party expected to account for anything except the difference in the market prices, and that no stock was purchased, sold, or delivered, or was intended to be. The plaintiff contends, in substance, that since it appears from the report that the defendants were doing a commission business for Doran, Wright, and Company, who were stockbrokers in New York and Boston, the wager if any must be deemed, as matter of law, to have been between him and Doran, Wright, and Company, and that the defendants are liable to him for the sums paid to them as margins and received by them from the sales of the stocks, the sales having resulted in every case in a

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profit. But the auditor has found that the sums described as margins were paid by the plaintiff to the defendants to protect them in the transactions referred to, and were not paid on account of actual purchases of stock or intended by either party to be so applied. In other words, they were in effect the stakes put up by the plaintiff in the various transactions into which he entered with the defendants, and which the auditor has found were wagers upon the future market prices of the stocks to which they related. It is clear that the law will not assist the plaintiff to recover back money paid under such circumstances. *Harvey* v. *Merrill*, 150 Mass. 1, 11. It does not appear that, when the transactions were "closed out" by the plaintiff's orders from time to time, the defendants received the proceeds of them. The plaintiff abandoned the count for money had and received. But assuming that the defendants did receive them, the law will not aid the plaintiff to recover the proceeds, any more than it will the money which he paid to the defendants on account of the transactions. It is possible that in England under a somewhat similar statute a different view would be taken. *Bridges* v. *Savage*, 15 Q. B. D. 363. But see *Cohen* v. *Kettell*, 22 Q. B. D. 680. The auditor has found in effect that all parties were cognizant of the character of the transactions. The fact that the defendants were doing a commission business for Doran, Wright, and Company was immaterial, if the jury found, as they properly could find, that the contracts were wagering contracts, and were so understood and intended by all parties. The instructions which the plaintiff requested were rightly refused. The transactions in question all occurred before the passage of St. 1890, c. 437, and that statute is not, therefore, applicable.

Exceptions overruled.

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PHŒBE C. HARRIS *vs.* CITY OF QUINCY.

Norfolk. May 28, 1898. — June 23, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Personal Injuries — Exclusion of Photographs as Evidence — State Valuation of Defendant City — Burden of Proof — Instructions.

No exception lies to the exclusion of photographs as evidence, if, so far as appears, their rejection was on the ground that the party offering them failed to make out the preliminary matters of fact necessary to make them admissible.

In an action for personal injuries occasioned to the plaintiff by reason of an alleged defect in a highway in the defendant city, it is not injured by a refusal to rule that the plaintiff has not made out his case because he has offered no evidence of the State valuation of the defendant, as referred to in Pub. Sts. c. 52, § 20, and to a statement that it was fair for the jury to assume in the absence of evidence that one fifth of one per cent of the valuation would amount to more than four thousand dollars. Apart from the burden of proving a valuation which would cut down its liability below four thousand dollars, which burden was upon the defendant, the court had a right to take notice of St. 1895, c. 90, which established the valuation in question and showed that the statement to the jury was correct.

TORT, for personal injuries occasioned to the plaintiff by reason of an alleged defect in a highway in the defendant city. At the trial in the Superior Court, before *Bond*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

J. W. McAnarney, for the defendant.

L. G. Blair, for the plaintiff.

HOLMES, J. This is an action of tort for personal injuries caused by slipping upon rough ice on the sidewalk of a public highway. The plaintiff had a verdict, and the case is here on two exceptions. The first is to the exclusion of photographs, which the defendant offered to show were taken immediately after the accident and truthfully represented the appearance of the sidewalk, except that the photographs were taken by sunlight and the accident happened in the evening when the electric light was shining. From this last qualification we infer that the photographs were not taken before the morning after the accident. The street was a well travelled street. We can-

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not say that the ruling was not based on the failure of the defendant to make out some preliminary matter of fact to the judge's satisfaction. If, for instance, the photographs were rejected on the ground that it appeared from inspection that they did not represent the slipperiness or the roughness of the ice or the quantity of it in such a way as to be instructive, we could not revise the finding of the judge. *Commonwealth* v. *Bishop*, 165 Mass. 148, 152. See *Hollenbeck* v. *Rowley*, 8 Allen, 473; *Verran* v. *Baird*, 150 Mass. 141; *Gilbert* v. *West End Street Railway*, 160 Mass. 403, 405. It is not disclosed with certainty what the ground of rejection was, and, as there were grounds which perhaps might have justified it, we cannot say that it was wrong.

It is provided by Pub. Sts. c. 52, § 20, that in actions like this no person shall recover more than one fifth of one per cent of the State valuation of the city, nor a greater sum than four thousand dollars. The second exception is to a refusal to rule that the plaintiff had not made out her case, because she had offered no evidence of the valuation of the city of Quincy, and to a statement that it was fair for the jury to assume in the absence of evidence that one fifth of one per cent of the valuation would amount to more than four thousand dollars. We are of opinion that the refusal was right, and the statement warranted under the circumstances. The burden of proving a valuation which would cut down its liability below four thousand dollars was upon the defendant, as is shown, if material, by the separation of the section limiting liability from the section imposing it. *Commonwealth* v. *Hart*, 11 Cush. 130, 134. *Commonwealth* v. *Fitchburg Railroad*, 10 Allen, 189, 190. But apart from the burden of proof, the court had a right to take notice of St. 1895, c. 90, which established the valuation in question, and showed that the statement to the jury was correct. See *Commonwealth* v. *Springfield*, 7 Mass. 9; *State* v. *Jackson*, 39 Maine, 291, 295; *Winooski* v. *Gokey*, 49 Vt. 282, 285; *State* v. *Chambers*, 93 N. C. 600, 602; *Fauntleroy* v. *Hannibal*, 1 Dillon, 118; *Ross* v. *Reddick*, 2 Ill. 73; *Money* v. *Turnipseed*, 50 Ala. 499. Finally, as the statute referred to is not only the evidence but the source of the valuation in question, an inspection of it shows that the failure to put it in could do the plaintiff no harm, inasmuch as put-

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ting it in could do the defendant no good. In other words the production of the acts of 1895 to the jury would have been the emptiest form, and the omission of it would not be ground for a new trial. *Exceptions overruled.*

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JOSIAH H. JONES, appellant, *vs.* ODANATHUS SIMPSON.

Middlesex. May 28, 1898. — June 23, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Will — Undue Influence.

Where it appears that whether the contents of an alleged will were known to the testatrix and whether they expressed her intentions depend wholly upon the testimony of the son, in whose handwriting the instrument is and in whose interest it is mainly drawn, it having been executed without the knowledge of the rest of the family or a word of counsel from any one but himself, and when the testatrix was of advanced years, and where the court is unable to believe his account of the interviews between himself and his mother which resulted in the execution of the instrument, a decree affirming a decree of the Probate Court disallowing the instrument as the last will of the testatrix will not be disturbed.

APPEAL, by Josiah H. Jones, from a decree of *Holmes*, J., affirming a decree of the Probate Court disallowing an instrument propounded for admission to probate, on the petition of said Jones for a letter of administration with the will annexed, as the last will of Mrs. Elizabeth Simpson, who died on March 1, 1897, when ninety-five years of age.

The will, with the exception of the formal parts, is as follows:

"First. I give and devise to my son Odanathus Simpson, his heirs and assigns, all the real estate of which I shall die seised, and I hereby direct that within thirty days after my decease my said son Odanathus or his heirs shall give a promissory note in the sum of twenty-five thousand dollars secured by mortgage upon such real estate as shall be good and ample security for the said sum, payable to John H. McAlvin of said Lowell, trustee.

"Second. I give and bequeath to my son Verrazano Simpson, his heirs and assigns, all the rest and residue of my property, including money, bank books, stocks, bonds, and personal prop-

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erty of every kind of which I shall die possessed, and I hereby direct that within sixty days after my decease my said son Verrazano or his heirs shall give a promissory note in the sum of twenty-five thousand dollars with good and sufficient security for the payment of said sum, payable to the said John H. McAlvin, trustee.

"The two notes of twenty-five thousand each payable to John H. McAlvin, trustee, are in trust for my son, Longinus Simpson, in case he shall appear in his own proper person within five years of the date of my decease.

"And in case the said Longinus Simpson shall so appear within the said term, I direct the said John H. McAlvin, trustee, to collect the said two notes and pay the proceeds of the same to the said Longinus Simpson, but in case the said Longinus Simpson shall not appear in his own proper person within the said term of five years from the date of my decease, I direct the said John H. McAlvin, trustee, at the termination of said term, to deliver up the said notes to their respective makers and to cancel and discharge any mortgage which may have been given to secure the said notes and to release any and all securities he may hold for the payment of the same, and my will is that unless the said Longinus Simpson appear in his own proper person within the said term of five years (after the date of my decease), neither he or any of his issue take any share of my estate.

"And I hereby nominate and appoint the said John H. McAlvin to be the executor of this my last will and testament."

The will was disallowed, on the ground that it was procured by the undue influence of Verrazano Simpson, and that was the only issue tried. The material facts appear in the opinion.

W. H. Bent & L. H. Kileski, for the appellant.

L. T. Trull & F. N. Wier, (*G. A. Sanderson* with them,) for the appellee.

BARKER, J. The evidence is reported to the full court, and the question for decision is whether upon the evidence the instrument should be admitted to probate.

We are of opinion that it should not. Mrs. Simpson was a widow whose husband had died testate in the year 1883, leaving an estate appraised at more than $400,000, from which she received as residuary legatee about $250,000 in personal property,

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and about $123,000 in real estate. The instrument propounded for probate as her will was executed by her on October 1, 1884, when she was eighty-three years of age. She then had two sons, who were her next of kin and presumptive heirs. One of these sons was her confidential and trusted adviser, and the alleged will is in his handwriting, is mainly in his own interest and upon his own statement it was executed by his mother without the knowledge of the rest of the family or a word of counsel from any one but himself. These are circumstances of suspicion, calling for care in the court which has the duty of deciding whether the instrument shall be admitted to probate, and requiring the court "not to grant probate without entire satisfaction that the instrument does express the real intentions of the deceased." *Baldwin* v. *Parker*, 99 Mass. 79, 87. *Ogden* v. *Greenleaf*, 143 Mass. 349.

The evidence, so far from disclosing any clear and sufficient explanation of the transaction to satisfy us that the alleged will expresses the real intentions of Mrs. Simpson, leads us to the belief that its execution was procured by the undue influence of the son who wrote it, in pursuance of a plan formed by him shortly after his father's death, to get control of his mother's fortune.

The father died in April, 1883, and almost immediately thereafter the son desired to buy his mother's property at the price of $200,000. This sale was checked by the opposition of the other son, and in October, 1883, Mrs. Simpson gave to each son real estate and mortgages to the value of $40,000, leaving the value of her remaining real estate very much less than the value of her remaining personal property. This was the situation of her estate when the alleged will was executed, in October, 1884. Assuming, as we must, that the provisions concerning the third son, who had not been heard from since he went as a sailor forty years before, would require ultimately no part of Mrs. Simpson's estate, the operation of the alleged will would be to give to the son who drew the instrument, and who alone of the family knew of its execution or was acquainted with its contents, all of her personal property, and to the other son her real estate, giving to the former three or four times the amount given to the latter, and making every future change of Mrs. Simpson's property from realty to personalty operate to the further advan-

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tage of the son in whose handwriting the instrument is drawn. The instrument was executed at the registry of probate, and there left upon deposit, and the register's receipt for it was not long after taken away by the son who had written the will, and was kept by him until after Mrs. Simpson's death. Three years after the instrument was executed, he bought of his mother all her property, except the house in which she lived and a farm, for the price of $150,000, much less than it was worth, and gave her in payment only his own unsecured notes, which would come back to him under the alleged will. Five years later, when Mrs. Simpson was ninety-one years of age, not having paid his notes as they matured, he made a final contract with her by which she gave up his notes upon his promise to pay her $550 a month until her death, and at her death these payments were largely represented by his unpaid notes in her possession.

Whether the contents of the alleged will were known to Mrs. Simpson, and whether they expressed her intentions, depend wholly upon the testimony of the son in whose handwriting the instrument is. It is impossible for us to believe his account of the interviews between himself and Mrs. Simpson resulting in the execution of the instrument and, upon a careful study of the whole evidence, we are satisfied that the decree disallowing the instrument was right.*

Decree affirmed.

* Verrazano Simpson, who testified at great length, stated in substance, among other things, that his mother suggested the making of a will; that she said that she was dissatisfied with her husband's will because he had given his relatives something and her relatives nothing; that the reason why she wanted to make a will was in order that her relatives might have something; and that she then told him that she wanted to give the real estate to Odanathus and the personal property to him, Verrazano, and nothing was said about any relative. He further testified that he thought at the time the will was made his mother had given away twenty or twenty-five thousand dollars to her relatives; that he had no talk with her as to the size of her estate or about the division between himself and Odanathus being equal; that he told her that she ought to make a will on account of the absence of her son, Longinus; that she made the suggestions as to certain changes when he copied the will from a draft prepared by a lawyer; that it was her suggestion that the note to be given by Odanathus should be secured on real estate; that he did not know whether it was her suggestion that the note to be given by him should be merely secured; and that his mother expressed dissatisfaction with the habits of Odanathus.

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HELEN HILTON *vs.* CITY OF BOSTON.

Suffolk. January 11, 1898. — June 24, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Personal Injuries — Due Care — Instructions — Defect in Sidewalk.

Where, in an action for personal injuries occasioned to the plaintiff by an alleged defect in the sidewalk of a street in the defendant city, the only question, which is whether the plaintiff was in the exercise of due care if he was walking as he usually walked, looking straight ahead, on an icy sidewalk after dark, is submitted to the jury under instructions not objected to, due care being defined to be "that kind and degree of care which a person of ordinary prudence and care would exercise in the same place, and under the same circumstances, and at the same time," and the jury being also told that "due care depends upon the time, the place, the circumstances, the situation, and everything that may reasonably enter into the transaction and the proper determination of such a question as that," the judge is not bound to give a request that "if you find that the plaintiff received the injuries complained of by reason of the defective condition of the highway in question, and if, in consideration of the circumstances attending the accident and the testimony offered in this case, you find no evidence of fault on his part, then from the mere absence of such evidence you may infer that he was, at the time he received the injuries complained of, in the exercise of due care."

TORT, for personal injuries occasioned to the plaintiff, by reason of an alleged defect in the sidewalk of a street in the defendant city. At the trial in the Superior Court, before *Richardson*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

W. H. Baker, for the plaintiff.

F. E. Hurd, for the defendant.

LATHROP, J. On December 11, 1894, at six o'clock in the evening, the plaintiff fell upon a sidewalk, and was injured. The testimony introduced on the part of the plaintiff, on the question of her due care, tended to show "that just before she fell she was walking as she usually walked, and was looking straight ahead towards Park Street, the direction in which she was going." On the question whether there was a defect in the street, the evidence tended to show that there had been a snowstorm two days before the accident, and it was in dispute

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whether the sidewalk had been cleared, or whether a ridge of hard snow remained in the centre.

The plaintiff made several requests for instructions, the fourth of which was the only one insisted upon at the argument, and it only need be considered. No exception was taken to any portion of the charge. The fourth request is as follows: "If you find that the plaintiff received the injuries complained of by reason of the defective condition of the highway in question, and if, in consideration of the circumstances attending the accident and the testimony offered in this case, you find no evidence of fault on her part, then from the mere absence of such evidence you may infer that she was, at the time she received the injuries complained of, in the exercise of due care."

It is a well settled rule in this Commonwealth, that, in order to recover for an injury on the ground of the negligence of another, the burden is upon the plaintiff to prove two propositions, first, that he was in the exercise of due care, and, secondly, that the defendant was negligent. These are two distinct propositions, and the jury must be satisfied affirmatively that the plaintiff has proved each. There are many cases in our reports in which, although there was evidence competent for the consideration of the jury of the defendant's negligence, a verdict has been ordered for the defendant, on the ground that the evidence did not show due care on the part of the plaintiff. These cases are so numerous that we content ourselves with citing two of them. *Tully* v. *Fitchburg Railroad*, 134 Mass. 499. *Chase* v. *Maine Central Railroad*, 167 Mass. 383.

The contention of the plaintiff, that, if negligence on the part of a town or city is proved, less evidence is required to show care on the part of a person injured, is founded upon a doctrine which no longer exists. It was formerly considered that, in an action against a town for a defect in a way, it was unnecessary to allege that the plaintiff was in the exercise of due care. *May* v. *Princeton*, 11 Met. 442. Negligence on the part of the town was the gist of the action, and this was the main thing to be proved. The plaintiff put in evidence of his own care to negative his own negligence. As is said by Chief Justice Shaw, in the case last cited: "When a traveller on the highway has broken down, it is obvious that this may be attributed to

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either one of two causes, viz. his own negligence, or the defect in the highway. Proof, which negatives the one, tends to establish the other, as the true and sole cause."

But, since the practice act of 1851, the schedule of forms in an action against a town for a defect in the highway contains an allegation of due care on the part of the plaintiff. St. 1851, c. 233. St. 1852, c. 312. Gen. Sts. c. 129. Pub. Sts. c. 167. And the Commissioners on the statute of 1851, in their note to the form in such a case, refer to *May* v. *Princeton*.

While negligence on the part of the town is the gist of the action, the plaintiff must, since the statute of 1851, prove as an affirmative proposition the exercise of due care on his part.

In several cases, where the question has been whether there was evidence for the jury, it has been said that, while the burden of proof is on the plaintiff to show that he was in the exercise of due care, such care need not be proved by directly affirmative evidence; but if all the circumstances under which the injury was received were proved, and the evidence excluded fault on the part of the plaintiff, and there was nothing in the conduct of the plaintiff, either of acts or of neglect, to which the injury might be attributed in whole or in part, due care might be inferred from the absence of all appearance of fault. *Mayo* v. *Boston & Maine Railroad*, 104 Mass. 137, 140. *Prentiss* v. *Boston*, 112 Mass. 43, 47. *Hinckley* v. *Cape Cod Railroad*, 120 Mass. 257, 262. *Smith* v. *Boston Gas Light Co.* 129 Mass. 318. *Peverley* v. *Boston*, 136 Mass. 366. *Gaffney* v. *Brown*, 150 Mass. 479, 481.

While the request before us may have stated correctly an abstract proposition of law, if we omit the coupling with it of the proposition relating to the finding of a defect, we are of opinion that the judge who presided in the court below was not bound to give it. It was not applicable to the case. The evidence was direct and does not appear to have been contradicted as to the way the plaintiff was walking. The only question was whether the plaintiff was in the exercise of due care, if she was walking as she usually walked, looking straight ahead, on an icy sidewalk after dark. This question was submitted to the jury under instructions not objected to. Due care was defined to be "that kind and degree of care which a

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person of ordinary prudence and care would exercise in the same place, and under the same circumstances, and at the same time." The jury were also told that "due care depends upon the time, the place, the circumstances, the situation, and everything that may reasonably enter into the transaction and the proper determination of such a question as that." We think this was all that was required.

But if this is not so, still we are of opinion that the judge was not bound to give the instruction requested. This called upon the jury first to determine whether there was a defect in the highway, and then to infer from that and the attendant circumstances that there was no fault on the part of the plaintiff. It was within the province of the jury to find for the defendant, if, on the testimony and the attendant circumstances they found that the plaintiff was not in the exercise of due care, without passing upon the question whether there was a defect in the highway.

Exceptions overruled.

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JOHN D. JOHNSON *vs.* FIELD-THURBER COMPANY.

Middlesex. January 13, 1898. — June 24, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Personal Injuries — Master and Servant — Action — Due Care — Negligence — Law and Fact.

An employee in a shoe factory, who, in going from the floor on which he works to the engine-room on the floor below to get some oil for the machine of which he has charge, is injured by falling through an open trap-door in a dark passageway leading to the engine-room, of the existence of which he is ignorant, although he has worked there about four weeks, and used the passageway daily, and is walking quickly without looking at the floor, is entitled, in an action against his employer for his injuries, to go to the jury upon the questions of his due care and his employer's negligence.

It cannot be ruled, as matter of law, in an action for personal injuries occasioned to the plaintiff while in the defendant's employ, by falling through an open trap-door left unguarded by a fellow servant who opened it, that the latter was negligent, if it does not appear that any guards were furnished by the defendant.

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TORT, for personal injuries occasioned to the plaintiff by the alleged negligence of the defendant. Trial in the Superior Court, before *Mason*, C. J., who ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

S. K. Hamilton & M. S. Case, for th plaintiff.

J. Lowell, for the defendant.

LATHROP, J. The plaintiff was injured by falling through an open trap-door in a passageway in the defendant's shoe factory. The negligence of the defendant alleged is in not informing the plaintiff of the existence of the trap-door. There was evidence tending to show the following facts. The plaintiff was in the defendant's employ, and had charge of a machine. On the morning of the accident, he went to the defendant's factory as usual, fifteen minutes before the hour of beginning work, adjusted the belts of the machine, and started to oil it, but finding his oil-cup empty, took it in his hands and started for the engine-room to fill it. It did not appear that there was any supply of oil other than that kept in the engine-room. To reach this room it was necessary for the plaintiff to go down a flight of stairs to the first floor of the factory, turn to the right, and pass through the main entrance and a passageway to the engine-room door. Seven feet from the entrance to the passageway, and four feet from the door of the engine-room was a trap-door in the floor of the passageway, four feet square. Below was the cellar. The plaintiff had been in the defendant's employ about four weeks, and had occasion every day to use the passageway. He testified that he did not know of the existence of the trap-door before the accident. The plaintiff also testified that he went at a quick walk, and did not look to the right or left, or look to see what was on the floor, or whether there was any leather or obstruction of any kind in the passageway. The trap-door was in a dark place, and the morning was dark. At the time the plaintiff was using the passageway, the trap-door was open, another employee of the defendant being in the cellar getting out some stock. The plaintiff fell through the opening, and was injured. There was also evidence that the power in the factory started at seven o'clock, and that each employee was

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ordered to be at his machine, prepared to run it, when the power started.

We are of opinion that, while there was evidence in the case to contradict some of the evidence for the plaintiff, there was evidence on which the jury might have found that the plaintiff was in the exercise of due care, and that the defendant was negligent. The case resembles closely that of *Hogarth* v. *Pocasset Manuf. Co.* 167 Mass. 225, and differs from that of *Young* v. *Miller*, 167 Mass. 224.

The defendant contends that the plaintiff, because he had worked in shoe factories for thirty years, ought to have known that there was a cellar beneath, and a trap-door leading thereto somewhere in the basement. But there was no evidence either that such factories usually had basements, or that, if they had, it was customary to put the trap-door in a dark passageway.

The defendant further contends that the leaving of the trap-door open was the negligent unauthorized act of a fellow servant. Whether the act was unauthorized depended upon whether the jury believed a witness for the defendant; and the jury were not bound to believe him. A foreman of the defendant testified that the trap-door was used on an average about three times a week, and from five to ten minutes at a time. The jury might, therefore, find that it was expected to be used. As to the negligence of a fellow servant, it cannot be said, as matter of law, that the servant was negligent in leaving the trap-door open unguarded, if no guards were furnished by the defendant; and it does not appear that any were furnished.

Nor can it be said, on the evidence, that the plaintiff went where he had no business to go at that time in the morning. We have already recited the evidence on this point, and need not repeat it.

Exceptions sustained.

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COMMONWEALTH MUTUAL FIRE INSURANCE COMPANY *vs.* CYRUS G. WOOD.

Suffolk. January 17, 1898. — June 24, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Mutual Fire Insurance Company — Assessment on Policy Holder — Action — Defence.

It is no defence to an action for the amount of an assessment levied under St. 1894, c. 522, §§ 47–49, upon a policy holder in a mutual fire insurance company, that he did not receive notice, which was addressed to him at the town where the insured property was situated, of the hearing before the auditor, the decrees of this court ordering and confirming the assessment having been made after due publication of notice; nor that the amount of the entire assessment was larger than was necessary; nor that the company was not licensed to do business by some of the States in which it incurred losses.

CONTRACT, to recover the amount of two assessments upon the defendant as a policy holder in the plaintiff corporation. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, upon agreed facts, in substance as follows.

The plaintiff was a mutual fire insurance company organized under the laws of this Commonwealth, and was authorized by statute to make insurance upon property located in any part of the United States or in Canada.

The plaintiff issued two policies of insurance to the defendant on property situated in this Commonwealth. On March 19, 1895, the plaintiff was enjoined by this court from doing further business, and subsequently a receiver was appointed.

On July 19, 1895, a petition was filed in this court by the president of the plaintiff company, praying that the court would examine an assessment previously voted by the directors of the company, and matters connected therewith, and would ratify the assessment with such amendments as might be necessary.

Upon this petition an order of notice was issued, returnable in three weeks, and published as therein directed, and at the hearing upon the petition, on August 9, 1895, the application was

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referred to an auditor, who was directed to appoint a time and place to hear all parties in the matter of the assessment, to give personal notice thereof in writing to the insurance commissioner, and through the post office or by publication, as he deemed practicable, to all the persons liable upon such assessment, and to hear the parties and report upon the correctness of the assessment and all matters connected therewith.

Thereupon a notice was mailed to the defendant at Quinapoxet, Holden, Massachusetts, the post office address where the property insured was situated, stating the time and place of the hearing before the auditor. The defendant, who resided in Worcester, did not personally receive this notice.

This court, by a decree dated March 5, 1896, among other things, ordered an assessment of $250,000, and directed the officers of the company to vote the same in legal form, which the directors proceeded to do. Afterwards, on March 25, 1896, the court confirmed the assessment of $250,000, which subsequently was made up in detail against the different policy holders of the company subject to assessment; and by a decree dated December 9, 1896, the assessment was ratified, confirmed, and established as computed upon the persons and for the amounts as appeared in the schedules annexed to the decree. By such schedules it appeared that the defendant was assessed on one policy $402.36, and on another policy $305.09, and notices of the assessments were sent to him on July 9, 1896.

The decrees ordering and confirming the assessment were made after the usual publication of notice as directed by the court. No personal notice of the hearings, except that of the auditor, was sent to the defendant, and he took no part therein.

The business of the plaintiff was done in this Commonwealth, but it insured property situated in many States where it had no license or authority under the statutes of those States to do business.

About four fifths of the claims for losses were in States outside of this Commonwealth, many of them in States where the plaintiff had no license to do business, and the liabilities of the plaintiff at the time of the appointment of the receiver were a little less than $94,000.

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B. W. Potter & C. M. Thayer, for the defendant, submitted the case on a brief.

W. B. Stevens, for the plaintiff.

LATHROP, J. The defendant contends that he is not liable to pay the assessment levied upon him, for the reason that he did not receive notice of the hearing before the auditor. The St. of 1894, c. 522, § 49, provides that the auditor "shall appoint a time and place to hear all parties interested, and shall give personal notice thereof in writing to the insurance commissioner, and through the post office, so far as he is able, to all persons liable upon said assessment or call." The auditor sent a notice by mail addressed to the defendant at the town where the property was situated, but he did not receive it, as he resided elsewhere.

We are of opinion that the fact that the defendant did not receive notice affords him no ground of defence. The decrees of this court ordering and confirming the assessment were after due publication of notice, and this was sufficient notice to him; and the decree ratifying and establishing the assessment was by the terms of the statute "final and conclusive upon the company and all parties liable to the assessment or call, as to the necessity of the same, the authority of the company to make or collect the same, the amount thereof, and all formalities connected therewith." St. 1894, c. 522, § 49. *Hamilton Ins. Co.* v. *Parker*, 11 Allen, 574.

The next contention of the defendant is that the amount of the entire assessment was larger than was necessary. But the decree of the court is, as we have just seen, conclusive on this point.

Finally, it is urged that the insurance company was not licensed to do business by some of the States in which it incurred losses. But the business of the company was conducted in this State, and the contracts were valid here. The policy holders became members of the company, and are liable to pay the assessment, whether it can be collected of them or not.

Judgment affirmed.

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AUGUSTUS F. LASH *vs.* FREDERICK L. AMES.

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Suffolk. January 17, 1898. — June 24, 1898.

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Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

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Conversion — Landlord and Tenant — Reasonable Time — Law and Fact — Action — Agency — Evidence.

Whether a tenant at sufferance is entitled to a reasonable time to remove his goods after a notice to quit from his landlord, a ruling to that effect is not required in an action by the tenant against the landlord for conversion of the tenant's goods which the landlord has removed, if the judge cannot, as requested, rule, as matter of law, that the time which elapsed between the notice and the removal was not a reasonable time. Where the facts are not disputed, what is reasonable time is a question for the court.

A landlord is entitled, at least after the lapse of a reasonable time from the giving to a tenant at sufferance of a notice to quit, if the tenant does not remove his goods, to remove them himself, and, having offered to take them where the tenant wishes, and received no directions in the matter, if he stores them subject to the tenant's order he is not liable to an action for conversion of the goods.

In an action by a tenant at sufferance against his landlord for the conversion of goods which, after a notice to quit, the latter removed, the defendant testified that he had several conversations with A., in which A. told him that the occupant of the building was the husband of one of the beneficiaries under a trust held by A., and in order to carry through the sale of the building to the defendant, and get the occupant, who was the plaintiff, to vacate the premises, it would be necessary to pay him a certain sum of money. The plaintiff, when asked, "Then you did authorize A. to deal with the question when you should get out," answered, "Certainly, I ordered him to." He further testified that among the controversies was one about moving out; and that "A. consulted with us all through, and we acquiesced in everything." *Held*, that the judge was warranted in finding that A. acted as the plaintiff's agent; and that the defendant's testimony was rightly admitted in evidence.

TORT, for the conversion of a lot of second hand building materials. Writ dated May 14, 1889. Trial in the Superior Court, without a jury, before *Dunbar*, J., who found for the defendant; and reported the case for the determination of this court. The facts appear in the opinion.

C. E. Hellier & W. H. S. Kollmyer, for the plaintiff.

J. H. Benton, Jr., for the defendant.

LATHROP, J. The record in this case is unnecessarily voluminous, consisting as it does of an agreed statement of facts, and forty pages of evidence, with the questions and answers set forth

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at length, together with certain rulings requested, and those given, the general finding for the defendant, and a brief report of the case to this court. Such a method of presenting a case to us for the determination of the questions of law involved is to be condemned. See *Roskee* v. *Mount Tom Sulphite Pulp Co.* 169 Mass. 528.

The general facts relating to these questions may be briefly stated thus. In the early part of 1887, Francis H. Lincoln was a trustee, under the will of John Hennessey, of an estate in Boston, which was then occupied by the plaintiff as a tenant at will, he holding over after the expiration of a written lease. The plaintiff's wife, Bridget A. Lash, was a daughter of John Hennessey, and one of the *cestuis que trust.* Lincoln, during the last of January or the first of February of that year, was negotiating a sale of the estate to the defendant. Some question arose as to whether Lincoln had power to sell, and he agreed to petition the Probate Court for leave to sell. On February 9, 1889, Lincoln and the defendant executed an agreement in writing, by the terms of which Lincoln agreed to sell and the defendant to buy the estate, the premises to be conveyed on or before March 9, if leave to sell were obtained from the Probate Court. The price to be paid was eleven dollars per square foot, which included "the amount to be paid to Augustus F. Lash and Bridget A. Lash, the tenants of said premises, for damages to their tenancy." Full possession of the premises was to be delivered to the defendant at the time of the delivery of the deed.

On the same day that the agreement was signed, Lincoln notified the plaintiff that he had agreed to sell the premises, and that the plaintiff was to be paid $3,000, from which was to be deducted rent and unpaid taxes. Lincoln and the plaintiff settled upon this basis upon March 9. The trustee was under no obligation to pay the plaintiff this sum, but it was paid to prevent his making, through his wife or otherwise, opposition to the sale, and thus to enable the trustee to obtain the necessary assent for leave to sell, and pursuant to the agreement of sale. Whether it was paid for any other purpose was in dispute. All the parties interested in the trust estate, including the plaintiff, requested that the prayers of the petition be

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granted. On March 4, the Probate Court made a decree allowing the trustee to sell; and the estate was conveyed to the defendant on March 9; and in the afternoon of the same day the defendant's attorney gave a notice in writing to the plaintiff, as follows, omitting the date, address, and the signature: "The premises occupied by you at 149 and 151 Essex Street, Boston, have been conveyed to Frederick L. Ames. Please remove your property therefrom and vacate the premises at once. Mr. Ames desires to tear down the building for purposes of rebuilding upon the estate without delay, and while he does not wish to incommode you further than is necessary, he must take down the building at once, and you are hereby notified to vacate the premises forthwith."

Before the conveyance the plaintiff had made preparations to move. On February 15, 1889, he had entered into a contract to lease a lot of land, and had bought a building thereon. He was to have room to store his goods as the owner of the building moved his goods out. He began to move his stock in trade, which consisted of old building materials, on March 4. On that day he moved one load, and one or more loads on each of the following days, namely, March 6, 8, 11, 12, 13, 14, but the greater portion of his stock was still remaining in his store on Essex Street. On March 13, the defendant's agents began to take down the building. The plaintiff on the same day wrote to the defendant asking that this work be suspended, and that he be given further time to remove the property. To this the defendant's attorney replied that the property would be removed the next day to a suitable place of storage at the plaintiff's risk and expense. On the same day the defendant's agent also told the plaintiff that unless the plaintiff desired the property moved to some other place he would move it the next day to 183 Washington Street; but if the plaintiff desired it moved to any other place he would so move it. On March 14, the defendant, with seven men and seven wagons, moved thirty loads of the plaintiff's property, and the plaintiff moved fourteen loads; and the building was cleared. There was evidence that the two sets of men did not interfere with each other; and that the person who had charge in behalf of the defendant told the plaintiff that he would take the goods anywhere he would say.

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It is stated in the agreed facts that the defendant's agents used proper care, did no unnecessary damage, and used no unnecessary force. On July 15, 1889, the defendant through his counsel offered to remove the goods to any place the plaintiff might name, without expense to him. This offer was declined, and in the year 1894, while the property was in the possession of the defendant, it was destroyed by fire, without fault on the defendant's part. The removal of the goods on March 14, 1889, is the conversion relied on.

The plaintiff requested the court to rule as follows: "1. The plaintiff upon the conveyance by Lincoln to Ames became a tenant at sufferance of Ames." This instruction was given. "2. The plaintiff was entitled to a reasonable time, after notice to quit from Ames, to remove his property, and what was a reasonable time is a question of law for the court." The court refused to give the first part of this request, but ruled that "reasonable time" was a question for the court. "3. The time which elapsed between the notice from Ames to the plaintiff and the seizure of the plaintiff's stock by Ames was not a reasonable time. 4. The seizure of the plaintiff's goods was unlawful, and was a conversion of the same by the defendant." These instructions the court refused to give. There was also a question of the admissibility of the testimony of the defendant as to certain conversations which the defendant had with Lincoln.

1. The tenancy at will of the plaintiff was terminated by the alienation of the land to the defendant; and he became a mere tenant at sufferance, and was not entitled to notice to quit. *Howard* v. *Merriam*, 5 Cush. 563, 574. *Benedict* v. *Morse*, 10 Met. 223. The plaintiff could not however be sued as a trespasser nor legal process be begun against him to recover possession of the land until he was notified of the sale, and a reasonable opportunity given him to remove his possessions. *Ellis* v. *Paige*, 1 Pick. 43, 49, and 2 Pick. 71, note. *Pratt* v. *Farrar*, 10 Allen, 519, 521. *Clark* v. *Wheelock*, 99 Mass. 14, 15. *Antoni* v. *Belknap*, 102 Mass. 193, 200. But, as was held in *Hooton* v. *Holt*, 139 Mass. 54, a notice calling for immediate possession is sufficient, and if an action is brought under the Pub. Sts. c. 175, without allowing time enough to remove, this is a matter to be shown in defence.

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Whether the same rule applies where the action is brought, as in this case, by the tenant at sufferance against the landlord need not be determined. See *Low* v. *Elwell*, 121 Mass. 309, and cases cited; *Coughlin* v. *Gray*, 131 Mass. 56; *Stone* v. *Cahey*, 133 Mass. 426; *Twombly* v. *Monroe*, 136 Mass. 464. We are of opinion that, whether the plaintiff was entitled to a reasonable time to remove his goods after a notice to quit from the defendant, a ruling to this effect was not required, as the judge could not have given, as matter of law, the third ruling requested, that the time which elapsed between the notice from Ames to the plaintiff and the seizure of the plaintiff's stock by Ames was not a reasonable time.

Where the facts are not disputed, what is reasonable time is a question for the court. The facts which we have already recited clearly show that the plaintiff had ample time to remove his goods.

2. The fourth ruling requested was properly refused. The defendant was entitled to possession of the building, free from goods, and he was entitled, at least after the lapse of a reasonable time from giving the notice, if the plaintiff did not remove them, to put them out himself. He offered to take them where the plaintiff wished, and, as the plaintiff would give no directions in the matter, the goods were stored subject to the plaintiff's order. The case falls within the principle laid down in *Shea* v. *Milford*, 145 Mass. 525.

3. The only remaining question is as to the admissibility of the testimony of the defendant as to certain conversations he had with Lincoln. The defendant testified: "I had several conversations with him [Lincoln], in which he told me that the occupant of the building was the husband of one of the beneficiaries under his trust, and in order to carry through the sale and get him to vacate the premises it would be necessary to pay him quite a sum of money. Finally, he told me he had got to pay Lash $3,000 to get out, during the time in which it was necessary to obtain the assent or approval of the Probate Court, and to prevent his opposing the approval by the court through his wife."

To make this evidence admissible, it was necessary to show that Lincoln acted in the matter as the agent of the plaintiff.

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The latter, when asked, "Then you did authorize Lincoln to deal with the question of when you should get out?" answered, "Certainly, I ordered him to." He further testified that among the controversies was one about the time of moving out; and that "Lincoln consulted with us all through, and we acquiesced in everything."

We are of opinion that the judge was warranted in finding that Lincoln acted as the agent of the plaintiff, and that the testimony of the defendant was rightly admitted in evidence.

Judgment for the defendant.

WILLIAM A. McDONALD *vs.* FREDERICK G. SARGENT & another.

Middlesex. January 18, 1898. — June 24, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

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Services Rendered — Minor — Ratification of Agreement — Evidence — Pleading.

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In an action upon a *quantum meruit* for services, part of which were rendered while the plaintiff was a minor, it is ruled correctly that, as a written agreement under which they were performed, and which was offered in evidence by the defendant, was not in accordance with Pub. Sts. c. 149, relating to the binding of apprentices, it did not bind the plaintiff, and could not affect his right to recover, unless the jury found that, after he became of age, he ratified and confirmed it, which was a question of fact; and that the jury might consider his acts in receiving the money stipulated therein, and all his other acts, as bearing upon that question.

A written agreement made by a minor for the performance of services, which he ratifies after he becomes of age, is admissible in evidence in an action upon a *quantum meruit* for his services; and its competency is not affected by the fact that the answer contains a general denial, and alleges payment only.

CONTRACT, upon an account annexed, for services rendered. At the trial in the Superior Court, before *Sherman*, J., the jury returned a verdict for the defendants; and the plaintiff alleged exceptions. The facts appear in the opinion.

J. F. Manning, for the plaintiff.

F. A. Fisher, for the defendants.

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LATHROP, J. The plaintiff sues upon a *quantum meruit* to recover for his services from March 25, 1891, to June 13, 1893. On April 27, 1891, after the plaintiff had worked for the defendants about a month, he entered into a written agreement with them by which he agreed to work for the defendants for three years, as an apprentice, for the purpose of learning the trade of a machinist. The amount to be paid was seventy-five cents a day for the first year, eighty-five cents a day for the second year, and ninety-five cents a day for the third year. At this time the plaintiff was a minor, not becoming of age until February 1, 1892. He continued to work for the defendants until June 13, 1893, receiving the amount agreed upon monthly, without objection. Then he left the defendants' employ, without notice. The jury found specially that the plaintiff, after he became of age, ratified and confirmed the written agreement, and that he was paid all that his services were reasonably and fairly worth, both during his minority and afterwards; and returned a general verdict for the defendants.

The principal question is whether the written agreement was admissible in evidence. Most of the objections made to it are that it did not comply with the provisions of the Pub. Sts. c. 149, relating to the binding of apprentices; but it was not put in for this purpose, and the judge ruled that, as it was not in accordance with the statute, it did not bind the plaintiff, and that it could not affect the plaintiff's right to recover, unless the jury found that after the plaintiff became of age he ratified and confirmed it; that whether he ratified and confirmed it was a question of fact; and that the jury might consider his acts, after he became of age, in receiving the money, and all his other acts, as bearing upon that question. These rulings we are of opinion were correct.

A written agreement made by a minor is not void, but voidable only, and may be ratified after he becomes of age. *Boyden* v. *Boyden*, 9 Met. 519. *Keegan* v. *Cox*, 116 Mass. 289. It was therefore competent for the defendants to show, aside from the question of pleading, what the agreement was which had been ratified.

As to the question of pleading, the answer contained a general denial, and alleged payment. The plaintiff contends that, as

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the agreement was not set forth in the answer, (see Pub. Sts. c. 167, § 22,) it was not admissible. A similar contention was made in *Warren* v. *Ferdinand*, 9 Allen, 357, where the plaintiff brought an action for use and occupation, and it was held that the defendant, under an answer containing a general denial only, might show that he held under a written lease, on the ground that the direct use of the evidence was to sustain the defendant's denial of the plaintiff's allegations, and not to set up a substantive fact in the nature of confession and avoidance. See also *Rodman* v. *Guilford*, 112 Mass. 405; *Phipps* v. *Mahon*, 141 Mass. 471, 473. We see no error in the admission of the agreement. *Exceptions overruled.*

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ANNIE GATELY *vs.* OLD COLONY RAILROAD COMPANY.

Suffolk. January 20, 1898. — June 24, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Land Damages — Grade Crossing — Motion to dismiss Petition for Want of Jurisdiction — Constitutional Law.

The Superior Court cannot entertain a petition for the assessment of damages caused by the taking of the petitioner's land by a railroad corporation, which petition is not brought, as required by § 5 of the St. of 1890, c. 428, within one year after the date of the decree of the court confirming the decision of the commission appointed under § 1 of that statute.

Section 5 of the St. of 1890, c. 428, is not unconstitutional because it does not provide for notice to the owner of land taken by a railroad corporation. The statute makes ample provision for notice, and no other notice is necessary.

PETITION, to the Superior Court, under the statutes relating to the abolition of crossings at grade by railroads and other roads, for an assessment of damages caused to the petitioner's property in Boston. The respondent appeared specially, and moved to dismiss the petition for want of jurisdiction. *Sheldon*, J., granted the motion and dismissed the petition; and, the petitioner having excepted, reported the case with the assent of both parties for the determination of this court. The nature of the motion and the material facts appear in the opinion.

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C. G. Keyes & C. D. Keyes, for the petitioner, submitted the case on a brief.

J. H. Benton, Jr., for the respondent.

LATHROP, J. The petition in this case alleges that a portion of the petitioner's land was taken by the respondent for railroad purposes by a decree of the Superior Court made on June 23, 1894, and she asks that her damages sustained by the taking be assessed by a jury at the bar of that court. The petition was filed on November 26, 1895, and the respondent moved to dismiss the petition on the ground that the court had no jurisdiction. This motion was granted, and the petition was dismissed. The report of the presiding justice, on which the case comes before us, states that the land was taken by a decree of the court made on June 23, 1894, under the provisions of the Sts. of 1892, c. 433, and 1893, c. 126.

By the St. of 1892, c. 433, § 5, the St. of 1890, c. 428, §§ 1–8, is made applicable to all proceedings under the act, and by the St. of 1893, c. 126, § 1, it is provided that damages shall be assessed and recovered as provided by the St. of 1890, c. 428.

All of these statutes relate to the abolition of crossings at grade by railroads and other roads. The St. of 1890, c. 428, § 5, provides for the assessment of damages, by a jury in the Superior Court, on petition brought within one year after the date of the decree of the court confirming the decision of the commission appointed under § 1.

The petitioner contends that § 5 is unconstitutional, because it does not provide for notice to the owner whose land is taken. But the entire proceeding of taking the land is by a suit in court. Before the commission is appointed, § 1 requires a notice "by public advertisement or otherwise, as the court shall deem desirable." Before the commission can act, there is, by § 3, to be "due notice and hearing," and "it shall prescribe the manner and limits" within which the alterations are to be made. By § 4, it is made the duty of the clerk of the court, "within thirty days after the making of said decree, to cause a copy of such decision and decree to be filed with the county commissioners of the county or counties in which the land or other property taken and the crossing are situated, and also to be recorded in the registry of deeds for the counties and districts in which such land, property, and crossings are situated."

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It thus appears that the statute makes ample provision for notice, and no other notice is necessary. *Allen* v. *Charlestown*, 111 Mass. 123. *Holt* v. *Somerville*, 127 Mass. 408. *Collins* v. *Holyoke*, 146 Mass. 298, 307. *Petition dismissed.*

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SYLVESTER B. LEONARD, executor, *vs.* CLARISSA W. HAWORTH, appellant.

Middlesex. January 25, 1898. — June 24, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Appointment of Trustee — Waiver of Will by Widow — Funeral Expenses, Burial Lot, and Monument — Perpetuity — Termination of Trust — Nearest of Kin — Nearest Blood Relations — Contingent Remainder.

Where a will contains no devise or bequest to any one as a trustee of the testator's estate, but appoints his brother to be executor and trustee, and the ultimate division which the testator contemplates is not to be made until all the provisions of the will have been carried out, and this will require action on the part of an executor or trustee after the death of the survivor of his widow and his sister, the word "trustee" must be regarded as used not merely as a synonym for "executor," and the brother may be appointed trustee.

While a testamentary provision for the preservation, adornment, and repair of a private monument may be void as creating a perpetuity for a use not charitable, a provision which will be completely performed upon the decease of the testator's widow is not open to that objection.

While, after the waiver by a widow of the provisions made for her in her husband's will she cannot demand that funds, as directed therein, shall be kept to pay the expenses of her funeral, and to erect a suitable tablet at the head of her grave, it is the duty of the executor, notwithstanding the objections of the widow, to retain funds sufficient for those purposes, until, upon her death, the funds shall be so expended, or their use, as the testator has willed that they should be used, shall have been shown to be impossible.

The words, "when my wife has deceased and her funeral expenses have been paid, and all the provisions named in this will have been carried out, I will what is left of my estate be devided among my nearest of kin," there being a provision for the use of a certain one of the testator's tenements by a sister during her whole natural life, indicate, when considered with the whole scope of the will, the intention that those who shall be the testator's nearest blood relations at the death of the survivor of his wife and sister shall then take what shall be left of his property.

PETITION to the Judge of Probate of the County of Middlesex, by the executor of the will of James Leonard, to obtain the

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instructions of the court as to the construction thereof. The judge entered a decree, from which Clarissa W. Haworth, a sister of the testator, appealed to this court. Hearing before *Lathrop*, J., who, at the request of the parties, reserved the case on the papers on file and an agreed statement of facts, the court to draw inferences of fact as it might see fit, for the consideration of the full court. The facts appear in the opinion.

F. A. Fisher, for the appellant.

W. H. Anderson, for the executor, submitted the case on a brief.

BARKER, J. The questions for decision are whether the testator's estate is to be held in trust; whether a part of his estate shall be retained to meet and discharge the funeral expenses of his widow and to place a suitable tablet at the head of her grave, notwithstanding the fact that she has waived the provisions of his will; and whether, under the direction that "when my wife has deceased and her funeral expenses have been paid and all the provisions named in this will have been carried out, I will what is left of my estate be devided among my nearest of kin," those who were the testator's nearest of kin at his death take a vested remainder, or those who will be his nearest of kin at the time of distribution will take under a remainder now contingent.

The testator died in his seventy-fourth year, and the will was written by himself, in the belief that he had not long to live, a few months before his death. His property consisted of a share of stock worth $1,175, a gold watch worth $50, mechanic's tools worth $25, other personalty worth $100, and three parcels of real estate, his home, and one single and one double tenement house, the whole value of the real estate being $12,370. His debts did not exceed $200. The language of his will indicates that he was somewhat illiterate, and that he had no exact knowledge of the meaning of legal terms. His wife was seventy-two years of age, and without issue. When the will was made, and at the testator's death, his only next of kin were Clarissa W. Haworth, a sister, the wife of Thomas Haworth, then in her seventy-fourth year, and then and now without living issue, and Sylvester B. Leonard, a brother, the executor, then in his seventy-first year, and who had two unmarried daughters then

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of the respective ages of forty and thirty-five years. The sister had for many years occupied the tenement, the use of which was given to her for life, paying rent therefor to the testator.

The widow having waived the provisions of the will, real estate to the amount of $5,000 has been assigned to her under the statute, and this amount is in excess of the value of either of the three parcels of the testator's real estate. She has been given an allowance of $400, and the testator's personalty is insufficient by more than $300 for the payment of the allowance, the charges of administration, the debts, and the legacies. The cemetery lot, wherein the testator is buried, was the property of his mother when she died intestate, her only heirs at law having been the testator and his brother and sister. The widow is unwilling that her funeral expenses shall be paid, or a tablet be placed at the head of her grave, by the executor of the testator, or paid for out of his estate.

1. Whether the remainder is vested or contingent, the estate cannot be finally settled while the widow and the sister both live. While the will contains no devise or bequest to any one as a trustee of the testator's estate, it does nominate and appoint his brother to be executor and trustee. The ultimate division which the testator contemplated was not to be made until all the provisions of his will had been carried out, and this would require action on the part of an executor or trustee after the death of the survivor of his widow and his sister. We think, therefore, that the word "trustee" was not used merely as a synonym for "executor," and that the brother may be appointed as trustee.

2. While there is no explicit provision that the funeral expenses of the testator's widow shall be paid out of his estate, we think it sufficiently appears to have been his intention that they should be so paid, and that she should be buried in the lot owned by himself and his brother and sister, and by the side of her deceased daughter, and that a suitable tablet should be placed at the head of his widow's grave at the expense of his estate.* If his widow's present intentions shall continue, it may

* The material portions of article 7 are as follows: "When my wife has deceased and her funeral expenses have been paid and all the provisions named in this will have been carried out, I will what is left of my estate be

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be impossible for the executor or trustee to carry out these intentions of the testator. But they are not merely provisions made for her in his will. They are directions as to the disposal of his own estate, which he might properly make, and which are to be carried into effect by his executor or trustee if possible. While a testamentary provision for the preservation, adornment, and repair of a private monument may be void as creating a perpetuity for a use not charitable, this provision is open to no such objection, as it would be completely performed upon the decease of the testator's wife. Although since her waiver of the provisions made for her benefit she cannot demand that funds shall be kept to pay the expenses of her funeral, or to erect a suitable tablet at the head of her grave, it is yet the duty of the executor to retain funds sufficient for those purposes, until upon the widow's death the funds shall be so expended, or their use, as the testator has willed that they should be used, shall have been shown to be impossible. This provision may have some effect upon the members of the testator's family other than his widow, and, not being solely for her personal benefit, is not abrogated by her waiver. See *Plympton* v. *Plympton*, 6 Allen, 178, 182; *Brandenburg* v. *Thorndike*, 139 Mass. 102.

3. We think that it was the testator's intention that his estate should not finally be divided or go to his next of kin until the death of the survivor of his wife and sister, and that it should then be divided among those persons who should then be his next of kin. By the scheme of his will, taking into consideration the value and amount of his real and personal estate, he intended that his wife should have the use of his home and the rents and income of two of his tenement houses during her life, and that his sister should have the use of his other tenement house during her life. This, for the time during which his wife and sister should both live, disposed of all his real estate. His household furniture, ornaments, library, and pictures were given absolutely to his wife, and his tools and watch to his brother. This disposed of his personalty except the one share of stock,

devided among my nearest of kin, and when my wife Harriet J. Leonard shal have deceased I derect that she be burred in our lot in the Lowell Cemeterry by the side of her beloved daughter and that a suitable tablet placed at the head of her grave."

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worth $1,175, which he would not suppose to be more than enough to pay his debts and the legacy to the trustees of the cemetery and the expenses of his wife's funeral and of the tablets which he directed to be put up, and the charges and expenses of administration.

His wife and sister were both old and childless, and he would naturally expect that they would live about the same length of time, and that when both should be dead there would be no living kin of his blood except his brother, that brother's daughters, and their children if they should marry. His sister's husband was alive, and if the testator gave to her a vested interest in the estate, its value was so small that upon her death her husband if he survived her might take it all under the statute, or at any rate the much larger share of it, so that practically whatever the sister should take by way of remainder would not go to his kin but to a stranger in blood. It is to be noticed that there are no words specifically giving the remainder to next of kin, or explicitly giving the legal title to trustees during the life estates, but that the final disposition is made by this provision: "When my wife has deceased and her funeral expenses have been paid and all the provisions named in this will have been carried out, I will what is left of my estate be devided among my nearest of kin." These words "nearest of kin" mean nearest blood relations. *Swasey* v. *Jaques*, 144 Mass. 135. *Keniston* v. *Mayhew*, 169 Mass. 166, 169. They indicate an intention that after all has been done which he has provided elsewhere in his will shall be done, including the use of a certain one of his tenements by his sister during her whole natural life, all that is then left of his property shall be divided among those who shall then be his nearest blood relations. If this intention did not appear from the whole scope of the will, the sister being at the testator's death only one of his next of kin, the construction would be otherwise. *Keniston* v. *Mayhew*, 169 Mass. 166. *Welch* v. *Brimmer*, 169 Mass. 204. *Heard* v. *Read*, 169 Mass. 216, 222, 223. But in view of the circumstances before mentioned, we think the intention of this testator was that those who should be his nearest blood relations at the death of the survivor of his wife and sister should then take what should be left of his property.

The result is, that the decree appealed from is correct, save

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that, instead of declaring that the balance of the estate will under the seventh clause of the will vest in and become the property of those who after the decease of Mrs. Haworth are then the nearest of kin of the testator, it should declare that the time of vesting will be at the death of the survivor of the widow and the sister. *Decree to be entered accordingly.*

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ALBERT G. HURLBURT *vs.* INHABITANTS OF BOXFORD.

Essex. January 26, 1898. — June 24, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

High School and School of Equal Grade — Tuition of Child attending School outside its Town — Statute.

A town which is not obliged by law to maintain a high school, and which has a school of equal grade within its borders, cannot be required, under St. 1894, c. 436, to pay for the tuition of a child of one of its inhabitants in another town, because the parent of the child prefers one school to the other.

CONTRACT, under St. 1894, c. 436, to recover money paid by the plaintiff to the town of Danvers for the tuition of his daughter in its high school. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, upon agreed facts, in substance as follows.

The defendant town is not required to maintain a high school under Pub. Sts. c. 44, § 2, as it does not contain five hundred families or householders. The plaintiff's minor daughter resided with him in Boxford, which does not itself maintain a high school or any school of corresponding grade, but there is maintained therein a school of corresponding grade by the trustees of a fund created by the will of Jonathan T. Barker, the school being free to all the inhabitants of Boxford and elsewhere, and the curriculum thereof and the instruction therein being equal to that of high schools as prescribed by law.

The plaintiff's child attended the high school in Danvers, being properly qualified to enter the same, the school committee of Boxford having first refused to approve such attendance upon

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the sole ground that the "Barker Free School" was a school of corresponding grade to a high school maintained in the town. The town of Danvers charged a reasonable amount for the tuition of the child.

The defendant town appropriates nothing for the support of the Barker Free School, and exercises no control over it, and it has never been approved by the State Board of Education.

W. H. Moody & H. E. Bartlett, (*J. H. Pearl* with them,) for the defendant.

C. H. Poor & E. B. Fuller, (*W. A. Butler* with them,) for the plaintiff.

LATHROP, J. This action is brought under the St. of 1894, c. 436; but we see nothing in the act which authorizes a finding for the plaintiff. The agreed facts show that there is maintained in the defendant town a school of corresponding grade to a high school. While this school is not maintained by the town, there is nothing in the act which requires it to be so maintained. Nor is there anything in the act which requires the school to be approved by the State Board of Education.

In many towns in the State there are academies, or schools of a grade equal to that of high schools, maintained from the income of funds left for the purpose, and which are free to the children of the inhabitants; and we have no doubt that the act before us was drawn with this fact in view. There is no reason why a town which is not obliged by law to maintain a high school, and which has a school of equal grade within its borders, should be obliged to pay for the tuition of a child of one of its inhabitants in another town, because the parent of the child prefers one school to the other. And, as we construe the statute, this is not required.

The judgment entered for the plaintiff must be reversed, and judgment entered for the defendant.

So ordered.

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JOSEPH H. DALLAGHER, administrator, *vs.* JAMES DALLAGHER, appellant.

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Middlesex. January 26, 1898. — June 24, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Construction of Deed — Tenants in Common — Sale of Undivided Interest in Real Estate.

Under a deed which conveys in consideration of a stated sum paid by J., E., and D. a certain parcel of land, with a double cottage thereon, the entire lot being described by metes and bounds, "unto the said J., E., and D., their heirs and assigns," and which contains after the description the words, "It is understood that J. is to have No. 70, and E. and D. No. 72 in said cottage, to have and to hold the above granted premises, with all the privileges and appurtenances thereto belonging, to the said grantees, their heirs and assigns, to their use and behoof forever," J. takes one undivided third.

APPEAL from a decree of the Probate Court, granting the petition of Joseph H. Dallagher, as administrator of the estate of Bridget Dallagher, for a license to sell one undivided third part of certain real estate for the payment of debts. The appellant, who was a son of the intestate, contended that she was the owner of an undivided half, and that a sale of an undivided third would injure the property, and cause loss to all interested. Hearing before *Morton*, J., who, with the consent of the parties, reported the case for the consideration of the full court. The facts appear in the opinion.

J. C. Burke & W. S. Marshall, (*J. F. Corbett* with them,) for the appellant.

No counsel appeared for the appellee.

LATHROP, J. The petitioner's intestate, Bridget Dallagher, derived her title to the land from the will of her husband, James Dallagher, who devised all his estate to her; and the question is whether he took one third or one half under a deed from Samuel N. Harris, dated March 20, 1871. This deed conveyed, in consideration of $2,100, paid by James Dallagher, Ellen Dallagher, and Eliza Dallagher, a certain parcel of land on Bartlett Street in Lowell, with a double cottage thereon, the entire lot being described by metes and bounds, "unto the said

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James, Ellen, and Eliza Dallagher, their heirs and assigns." After the description of the premises followed these words: "It is understood that James D. is to have No. 70, and Ellen and Eliza No. 72 in said cottage, to have and to hold the above granted premises, with all the privileges and appurtenances thereto belonging, to the said grantees, their heirs and assigns, to their use and behoof forever."

If the words, "It is understood that James D. is to have No. 70, and Ellen and Eliza No. 72 in said cottage," are omitted, it is plain that the grantees took as tenants in common, and each owned one undivided third in the entire estate. And we are of opinion that these words are too uncertain and ambiguous to change the result. These words might as well refer to occupancy as to the legal title. The report sets forth many facts to show the probable intention of the parties, but, whatever their intention may have been, we are of opinion that the words above quoted are not sufficient to give a title in fee to James Dallagher in one half of the land. *Decree affirmed.*

SUSAN D. RITCHIE *vs.* WESLEY RITCHIE & others.

Suffolk. May 28, 1898. — June 24, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Cloud upon Title to Land — Effect of Conveyance — Contingent Remainder — Statute.

Land was given by will to A. for life, he to pay all taxes thereon, with remainder to his brother contingent upon his leaving no issue. A. became insolvent, and his assignees conveyed their title to his wife, who took possession of the land, and then conveyed it to her son, but retained possession, receiving the rents and profits and paying the taxes. Subsequently she took a conveyance of the land from the purchaser at a sale for nonpayment of taxes assessed thereon prior to A.'s insolvency, and later took a reconveyance from her son. *Held*, that she did not acquire an estate in fee by her acts; and that the contingent remainder in A.'s brother was protected by Pub. Sts. c. 126, § 8.

BILL IN EQUITY, filed February 15, 1897, in the Superior Court, to remove an alleged cloud upon the title to certain land

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in Boston. After a hearing on the agreed facts, a decree was entered dismissing the bill; and the plaintiff appealed to this court. The facts appear in the opinion.

H. P. Harriman & G. P. Wardner, for the plaintiff.

J. M. Gove & H. D. Gove, for the defendants.

LATHROP, J. Caroline J. Ritchie died seised of a parcel of land, divided into three estates, and situated on Marginal Street in that part of Boston called East Boston. By her will, dated January 3, 1885, and admitted to probate on January 30, 1888, she devised this land to her son, Elliot Ritchie, "to have and to hold to him for and during the term of his natural life, he paying all taxes, insurance, and keeping the estate in good order and repair. At his death I devise said estates to any child or children that he may leave, if any. And if he leaves no child, then I devise said estates to his three brothers, or the survivors or survivor of them, or to the issue of any deceased brother by right of representation."

The plaintiff is the wife of Elliot Ritchie, and the defendants are his three brothers. The agreed facts state that "Elliot Ritchie is supposed to be living, but is now in parts unknown." It is not stated when he went away. The plaintiff claims to own the land in fee under the following circumstances. Elliot Ritchie became an insolvent debtor in July, 1892, and assignees of his estate were duly appointed. On January 3, 1893, these assignees conveyed to the plaintiff, in her right, all their right, title, and interest in the premises; and immediately after the conveyance the plaintiff took possession of the premises, and has ever since collected and received the rents and profits therefrom, and has paid all taxes that have since been assessed upon said property, except for the year 1896, and has made repairs. In 1892, the three estates were sold by the tax collector of the city of Boston, on account of the nonpayment of the taxes of 1891, to one Stephen P. Weld. He conveyed two of the estates to the plaintiff on December 17, 1894, and on February 20, 1895, he conveyed the remaining estate to her. On June 20, 1893, the plaintiff conveyed the premises to her son in law, who reconveyed it to her on July 13, 1893. On the last named date, the plaintiff conveyed the premises to her daughter, who reconveyed the same to her mother on February 10, 1897.

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It is clear that the plaintiff, by the purchase from the assignees of her husband's estate in insolvency, acquired only his life estate, with all the burdens imposed by the will, among which was the paying of taxes. It was her duty, therefore, when she acquired possession of the land to pay the taxes which had accrued, or, if the land had been sold for taxes, to redeem it. She had no right to wait until the right to redeem from the tax sales had passed, and then seek to acquire a new title by obtaining conveyances from the purchaser at the tax sales. Nor could she by going through the form of a conveyance to her son in law and afterwards to her daughter, so that she had not the record title to the premises when the conveyances were made to her by Weld, gain any better title than if she had retained title to the premises. There is nothing to show that these conveyances were made in good faith and for a valuable consideration, while it does appear that during all the time from June 20, 1893, to February 10, 1897, when the record title was in her son in law or in her daughter, the plaintiff was in possession of the premises, collecting the rents and profits therefrom, and paying the taxes.

The case falls within the Pub. Sts. c. 126, § 8, which reads thus: "No expectant estate shall be defeated or barred by an alienation or other act of the owner of the precedent estate, nor by the destruction of such precedent estate, by disseisin, forfeiture, surrender, or merger." This statute first appeared in the Rev. Sts. c. 59, § 7, and was re-enacted in the Gen. Sts. c. 89, § 10. By the will of Mrs. Ritchie the defendants took remainders in the estate contingent on the death of Elliot Ritchie leaving no child. That a contingent remainder is protected by the statute is clear from the language of the Commissioners in their report to the Legislature in 1835.

If we were to draw inferences from the agreed facts, we might say that the plaintiff has been unsuccessful in her ingenious scheme to defraud the defendants. We content ourselves, however, with saying that, on the agreed facts, the judge below was clearly right in dismissing the bill.

Decree affirmed.

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JOHN E. CASSIDY *vs.* HIRAM P. MASON & others.

Suffolk. November 19, 1897. — June 25, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Deed — Condition — Restriction.

Land was conveyed by a deed reciting as follows: "Provided that no building shall ever be erected on said lots of land or either of them within ten feet of the streets as exhibited on said plan." A subsequent deed of the land contained the following clause: "On condition that no building shall ever be erected on said lot within ten feet on said" street "as laid down on said plan." A later conveyance of the land recited that "the premises are sold subject to the condition that no building shall ever be erected on the granted premises within less than ten feet from said street." *Held*, that the clauses in the several deeds were not to be considered as conditions, a breach of which would work a forfeiture, but as restrictions.

CONTRACT, to recover $1,000, paid as part consideration for the purchase of certain land in Watertown. The case was submitted to the Superior Court, and, after judgment for the defendants, to this court, on appeal, upon agreed facts, the material parts of which appear in the opinion.

J. J. Sullivan, for the plaintiff.

W. C. Stone, for the defendants.

FIELD, C. J. Andrew L. Chamberlain conveyed in fee to Thomas Gould, by deed dated October 15, 1847, certain lots of land in Watertown, Massachusetts, according to a plan mentioned in said deed, and, after the description of the lots in the granting part of the deed is the following proviso: "Provided that no building shall ever be erected on said lots of land or either of them within ten feet of the streets as exhibited on said plan." Joseph Gould conveyed in fee back to Thomas Gould, by deed dated April 15, 1853, one of said lots which had been conveyed to Joseph Gould by said Thomas Gould by deed dated October 27, 1849. After the description of the lot the deed of Joseph Gould contained in the granting clause the following words: "On condition that no building shall ever be erected on said lot within ten feet of said plan [*sic*] as laid down on said plan." It is agreed that the word "plan" first

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used in this proviso is a mistake for street. Some of these lots, including the lot conveyed by Joseph Gould to Thomas Gould, were conveyed in fee to Catherine Hooper. George K. Hooper and Catherine Hooper, his wife, in her right, by deed dated August 5, 1872, conveyed in fee to Maria Mason the lots of land conveyed to Mrs. Hooper, and in the granting part of the deed, after the description of the lots with one boundary on a street, is the following clause: "The premises are sold subject to the condition that no building shall ever be erected on the granted premises within less than ten feet from said street." Maria Mason died intestate, being at the time of her death seised in fee of the lots of land so conveyed to her, leaving a husband and children who were her only heirs at law. The husband and the children are the defendants in the present action.

The defendants and the plaintiff entered into a contract, whereby the defendants agreed, on certain terms therein expressed, to convey to the plaintiff "in fee simple, free from all encumbrances except the restriction hereinafter referred to, by a warranty deed in the usual form, with the usual covenants, . . . the real estate situated in said Watertown, . . . which was conveyed to Maria L. Mason by deed from George K. & Catherine Hooper," etc., excepting a certain portion which need not be described. Said agreement provided that "said real estate is to be conveyed subject to the 'restriction that no building shall ever be erected on the granted premises within less than ten feet from said Beechwood Avenue,' except as to said restriction said real estate is to be conveyed by good title by warranty deed as above stated, free from all encumbrances whatever." Maria Mason is the same person as Maria L. Mason. The plaintiff paid the defendants $1,000 on the execution of the agreement as part consideration of the purchase. The defendants tendered to the plaintiff a deed of the lots of land which they agreed to convey, which, after the description of the lots, contained the following clause: "The premises hereby conveyed are subject to the restriction (mentioned in deed from George K. & Catherine Hooper to Maria L. Mason dated August 5th, 1872, and recorded in said Registry in Book 1223, page 315) that no building shall ever be erected on the granted estate

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within less than ten feet from said street, which is now called Beechwood Avenue." The plaintiff refused to accept said deed solely on the ground that the premises granted were subject to a condition a breach of which would work a forfeiture, and not merely to a restriction; and he sues to recover back the $1,000 he had paid. The case was submitted to the Superior Court, on an agreed statement of facts, the eighth and eleventh paragraphs of which are as follows:

"Eighth. The real estate referred to in the declaration had been a portion of a large tract of land which had been laid out into lots and streets, and which were represented on a plan duly filed in the Registry of Deeds aforesaid, dated June 1, 1847, all done many years before said Maria Mason acquired the land as above stated, and before the deed aforesaid from Chamberlain was made. Said plan is the one referred to and described in the said exhibits hereto annexed. Beechwood Avenue, or the street referred to in the said deed from Geo. K. and Catherine Hooper to Maria Mason, was one of the streets laid out and represented as aforesaid on said plan. . . .

"Eleventh. If the provision, in deed aforesaid from Chamberlain to Gould, 'provided that no building shall ever be erected on said lots of land or either of them within ten feet of the streets as exhibited on said plan,' and the provision in said deed from Gould to Gould, 'on condition that no building shall ever be erected on said lot within ten feet of said plan [street] as laid down on said plan,' and the provision in the said deed from Hooper *et al.* to Maria Mason, 'the premises are sold subject to the condition that no building shall ever be erected on the granted premises within less than ten [feet] from said street,' are simply restrictions, and if no one of them constitutes a condition a breach of which might work a forfeiture, the plaintiff admits his action is not well founded, and that he is not entitled to recover of the defendants."

The Superior Court ordered judgment for the defendants; and the plaintiff appealed.

We are of opinion that the provisions in the deeds which we have quoted, from which Mrs. Mason derived her title, are not to be considered as technical conditions a breach of which would work a forfeiture, but as restrictions. *Ayling* v. *Kramer*,

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133 Mass. 12. *Skinner* v. *Shepard*, 130 Mass. 180. *Episcopal City Mission* v. *Appleton*, 117 Mass. 326. *Sohier* v. *Trinity Church*, 109 Mass. 1, 19. *Judgment affirmed.*

HENRY A. THOMAS, JR. *vs.* D. MORGAN CROSBY, trustee, & others.

Suffolk. December 13, 1897. — June 25, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Trust — Construction of Deed.

A trust deed was executed by H., providing that, after his death, one third of the net income of the trust property was to be paid to his wife M., and two thirds to his children or their issue, for life; that, if any child died, his portion of the income was to go to the surviving children, unless the child dying left issue, when it was to go to the issue by right of representation; that if all the children and their issue should die, his wife M., if living, was to take the whole income, and if she should die, the children or their issue, if any were living, were to receive the whole income; that on the death of the last survivor of "said wife" and child or children, or within twenty-one years after the death of "said wife and of the child now living," the corpus of the trust was to be conveyed to the children then living and the heirs of such children as had deceased; and that, in the event of the death of "said M. and the child or children of said H." during his lifetime, all the trust property should thereupon be conveyed to H. and the trust should cease. *Held*, that the trust was for the benefit of H., his wife M., and their children, and the issue and heirs of such children, and not for the benefit of another wife of H. or her children.

BILL IN EQUITY, filed May 28, 1897, by a child of Henry A. Thomas and Nellie D. Thomas, his second wife, he having been divorced from his first wife, Mary E. Thomas, against D. Morgan Crosby, trustee, said Henry A. Thomas and Mary E. Thomas, and Fannie E. Fiske, their daughter, to review and vacate a decree of this court entered on August 28, 1896, terminating a trust created by said Henry A. Thomas. Hearing before *Morton*, J., who reported the case for the consideration of the full court. The facts appear in the opinion.

G. R. Pulsifer, for the plaintiff.

J. Willard, for Mary E. Thomas and Fannie E. Fiske.

E. B. Callender, for Henry A. Thomas, Sen., and the trustee.

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FIELD, C. J. The present bill is not strictly a bill of review, because the present plaintiff was not a party to the first suit, or privy to any of the parties, but the bill may be taken as an original bill by a plaintiff who alleges that his rights are affected by the decree entered in that suit, and it partakes somewhat of the nature of a bill of review. The deed of trust to which the bill relates was of two parcels of land with the buildings thereon, and it was executed by Henry A. Thomas and his wife, who signed it in token of her assent and of her release of all right to dower and homestead. After making certain provisions for himself, and for himself and his family during his life, he directed the trustee, among other things, as follows:

"On the death of the said Henry A. Thomas to pay the income of said trust estates, after first paying the Interest on said mortgages, Taxes, and Expenses to Mary E. the wife, and to the child or Children of the said Henry A. Thomas as follows, viz.

"One third thereof to the said Mary E. and the remaining two thirds to the Child, or if more than one, to the Children of the said Henry A. the said share to each during their respective lives. And if either of the Children Dies, his (or her) portion to the Surviving Child or Children, unless he leaves issue, living, who shall then take by right of Representation. But if all the children and such Issue, or the said Mary E. Decease, either class living, the other, and whether before or after the said Henry A's Death, the surviving class to take the whole income, during the life of any of its members.

"On the Death of the last survivors of said wife and Child or Children, or within twenty one years after the decease of said wife and of the child now living, whichever event shall first happen, then to transfer and convey said trust Estates as then constituted and all accumulations thereof to and among the heirs of said Child or Children of said Henry A. if all be then deceased; but if not, then to such Children as shall then be living and to the heirs of such as may have deceased in equal shares."

The following clause of the deed of trust is very significant: "In the event of the death of the said Mary E. and the child or Children of said Henry A. during the lifetime of said Henry A., all the trust estate and property then held under this deed of

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trust, shall thereupon forthwith be conveyed and transferred to the said Henry A. Thomas, and thereupon this trust shall cease."

The possibility of Henry A. Thomas having children by Mary E. would end with her death; but the possibility of his having children by other women whom he might marry would end only with his death, and there might be a posthumous child. When this deed was executed, Henry A. Thomas's family consisted of himself, his wife Mary E., and one child by her. The trust contemplates that he might have other children, but, we think, other children by Mary E. Thomas. After his death, his wife Mary E. Thomas and his children are to receive the whole income for their lives, Mary E. to receive one third, and the children or their issue two thirds. If any child dies, her or his portion of the income is to go to the surviving children, unless the child dying leaves issue, when it is to go to the issue by right of representation. If Mary E. dies, the children, or the issue of such children, if any are living, are to receive the whole income; and if all his children and their issue die, Mary E., if living, is to receive the whole income. On the death of the last survivor of his wife and child or children, or within twenty-one years after the death of his wife and the child living at the date of the deed, the corpus of the trust is to be conveyed to the children then living, and to the heirs of such children as have deceased.

We regard the deed of trust as a sort of family settlement for himself, his wife Mary E., and the one child, their issue living at the date of the deed, and for any other children issue of himself and his wife Mary E. who might thereafter be born, and the issue and heirs of such child or children; but the trust, we think, is not for the benefit of another wife, or for children by another wife. Under this construction of the deed of trust, the plaintiff has no interest in the trust, and cannot impeach the decree entered in the first suit.

In the present suit, a guardian *ad litem* or next friend has been appointed to represent persons not ascertained, or not in being, pursuant to St. 1896, c. 456. It does not appear that any such guardian *ad litem* or next friend was appointed in the first suit. Whether, if Fannie E. Fiske should die before the provision for the conveyance of the corpus of the trust to her heirs took effect, and should leave issue, and her mother should

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survive her father, such issue would not be beneficiaries under the trust; or whether on the death of Mary E. Thomas and of Fannie E. Fiske, her father having died while one or both were living, the heirs of Fannie E. Fiske would not be beneficiaries, we cannot consider under the present bill. If the trustee has any doubt whether he would be protected against the claim of such issue or heirs by the decree in the former suit, if he obeys the decree, it is for him to ask to have that decree reviewed. The present bill must be dismissed, because the plaintiff has no standing in court. *So ordered.*

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WILLIAM M. BELCHER *vs.* WILLIAM A. SHEEHAN.

Suffolk. March 15, 1898. — June 25, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Officer — Neglect to arrest on Execution issued on Void Judgment.

In an action against an officer to recover damages for neglect to arrest a person on an execution, it is open to the defendant to prove that the judgment and execution were void.

TORT, against a constable, to recover damages for his neglect to arrest one Curtis on an execution. Trial in the Superior Court, without a jury, before *Sheldon*, J., who ruled that the defendant could not impeach the judgment, that it was conclusive until reversed, and found for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

J. L. Powers & C. W. Cushing, for the defendant.

C. E. Allen, for the plaintiff.

FIELD, C. J. As Curtis, when the plaintiff brought the action against him, was a resident of the State of New York, and had no place of business or last and usual place of abode in this Commonwealth, and was not served with process and did not appear in the action, and as no attachment was made upon his property within the Commonwealth, the judgment rendered against him is void, and Curtis, if sued on the judgment, could avoid it by plea and proof. *Needham* v. *Thayer*, 147 Mass. 536.

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Rand v. *Hanson*, 154 Mass. 87. *Kimball* v. *Sweet*, 168 Mass. 105. As Curtis was described in the writ as "of Everett in the County of Middlesex, having his usual place of business in said Boston," it may be that the execution delivered to the defendant appeared to be regular and valid on its face. A copy of the execution is not before us. The extent to which an officer is protected in the service of process which is regular and valid on its face has been recently considered in this court in *Tellefsen* v. *Fee*, 168 Mass. 188. It is, however, unnecessary to determine whether, if the defendant had arrested Curtis on the execution, the process would have protected him. The defendant neglected to arrest him, and in an action to recover damages for such neglect it is open to the defendant to prove that the judgment and execution were in fact absolutely void. *Albee* v. *Ward*, 8 Mass. 79, 86. *Hitchcock* v. *Baker*, 2 Allen, 431. Freem. Ex. (2d ed.) § 103. *Exceptions sustained.*

RUSSELL A. SEARS *vs.* JOSEPHINE A. MOORE, administratrix.

Suffolk. March 15, 1898. — June 25, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Promissory Note — Genuineness of Signature — Burden of Proof — Credibility of Evidence — Admissions by Payee.

A promissory note was signed by M., and made payable after date to the order of E., by whom it was indorsed in blank. The defendant, who was the administrator of M., denied specially in the answer the genuineness of M.'s signature, and demanded that it should be proved, and also alleged that the note was indorsed to the plaintiff, after maturity, without consideration, and was given to E. as an accommodation note, without consideration, by M. The plaintiff testified that the note was delivered to him by E. nearly five years after it was made, and long after its maturity. *Held*, that the same defences were open to the defendant as if the action had been brought by E., that the burden was on the plaintiff to prove the genuineness of the signature, and that the defendant had a right to go to the jury upon the credibility of the evidence introduced by the plaintiff that the signature was genuine.

When a promissory note is indorsed by the payee after it is overdue, admissions by the payee while owner of the note are admissible in evidence against the indorsee in an action by him against the maker.

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CONTRACT, on seven promissory notes. Trial in the Superior Court, before *Hardy*, J., who, at the close of the testimony, directed the jury to return a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

J. J. Feely, for the defendant.

G. W. Anderson, for the plaintiff.

FIELD, C. J. This is an action of contract upon seven promissory notes, each purporting to have been signed by William Moore, and made payable at various times after date to the order of E. Wilson and Company, and indorsed in blank by E. Wilson and Company. The defendant, who is the administratrix of the estate of William Moore, denied specially in her answer the genuineness of the signatures of Moore, and demanded that they should be proved at the trial. Pub. Sts. c. 167, § 21. She alleged that the notes were indorsed to the plaintiff, Sears, after maturity, without consideration, and that the notes were given by Moore to E. Wilson as accommodation notes, without consideration. There was evidence that E. Wilson, or Epaminondas Wilson, did business under the name of E. Wilson and Company, and that the notes were given to him while doing business under that name. Sears, the plaintiff, testified that the notes were delivered to him by Wilson nearly five years after they were made, which was a long time after the maturity of the notes. It is plain that the same defences were open to the defendant as if the action had been brought by Wilson, and that, the genuineness of the signatures having been specially denied, the burden was on the plaintiff to prove the genuineness, and that the court could not properly order a verdict for the plaintiff. The defendant had a right to go to the jury upon the credibility of the evidence introduced by the plaintiff that the signatures were genuine. We deem it unnecessary to notice the other exceptions taken further than to say that, when promissory notes are indorsed by the payee after they are overdue, admissions by the payee while owner of the notes are admissible in evidence against the indorsee in an action by him against the maker. *Sylvester* v. *Crapo*, 15 Pick. 92. *Fisher* v. *Leland*, 4 Cush. 456.

Exceptions sustained.

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SHEPARD AND MORSE LUMBER COMPANY *vs.* ALBERT R. ELDRIDGE.

Suffolk. November 10, 1897. — June 29, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Check — Forged Indorsement — Obligations of Payee and Drawer — Imputation of Knowledge of Clerk's Fraud — Ratification — Action — Estoppel — Finding — Evidence.

The holder of an unindorsed check, payable to his own order, is under no legal obligation to the drawer to exercise care as to how the check shall be kept, or to whom he shall commit its custody, or to see to it that the check shall not be put in circulation by the forgery of his indorsement, so long as he acts honestly without collusion; and he is not deprived of his remedy against the drawer by merely negligently intrusting such a check to a clerk who, due care would have told him, was dishonest, and thus giving the clerk an opportunity to commit crime.

The holder of an unindorsed check, payable to his own order, is under no other legal obligations with reference to it than those which rest upon any holder of commercial paper completed and put in circulation by the maker.

If a check is taken by the payee in absolute extinguishment of the drawer's debt to him, that circumstance cannot relieve the drawer from his legal obligations as such; and if the check is stolen from the payee and collected upon a forged indorsement, that does not furnish a sufficient reason why the loss should remain upon the payee rather than fall upon the drawer.

The fact that the drawer of a check has been in the habit of buying goods of the payee for several years, and of making payment by checks, imposes no liability upon the payee as to the methods in which his business shall be conducted, or as to what clerks he shall employ.

The payee of a check is not to be charged with the knowledge that it has been stolen or embezzled and collected upon a forged indorsement, either because his clerk, who committed the forgery, had that knowledge, or because the means of knowledge existed in his books of account, so that he would have made the discovery if his monthly trial balances had been made by an honest clerk.

One who has become the holder of a check is under no duty to give notice to the drawer and the drawee, or to the public, as of a lost check, if the check is stolen and collected upon a forged indorsement, and he remains honestly ignorant of those facts, and incorrectly, but honestly, assumes that it has been collected in the regular course of his business; nor is there a duty to any one connected with the check which requires him to examine his books of account, or to make trial balances, or to discover by any means what has become of the check; and he is not to be charged with knowledge which he did not in fact have.

If an employer, after he has been told that his clerk has been depositing in a certain bank to his own credit checks payable to the employer, asks and receives

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from the clerk a check on that bank for the amount of a bill due from him to the employer for goods, which check is paid by the bank, and also consents that another check drawn by the clerk upon that bank may be paid and charged against the clerk's deposit therein, this does not work an actual or implied ratification of the clerk's acts in indorsing the checks with his employer's name or in collecting them.

The receipting of bills by the seller of goods without informing the buyer that a prior debt for which a check was given had not been extinguished, if not done with intent to mislead him, will not justify the buyer in inferring that the check has been collected by the seller so as to estop him, in an action to recover the amount of the check, from showing that it had been stolen by his clerk and collected upon a forged indorsement.

A special finding of fact by a judge, sitting without a jury, will be disregarded, where evidence relevant and material to the question was wrongly excluded, even if the finding was correct upon the evidence admitted.

The payee of a check who, the check having been stolen from him, put in circulation by forgery, and paid by the drawee, misleads the drawer to his prejudice, and thereby places him in a worse position than he would otherwise be in with reference to the assertion or protection of his rights resulting from what has been done with the check, is estopped from maintaining an action against the drawer upon the check.

In an action by the payee against the drawer of a check, which had been stolen by the payee's clerk, put in circulation with a forged indorsement, paid by the bank upon which it was drawn, and returned to the drawer, from whom it was obtained afterwards by the payee, who had been informed of the forgery, evidence of what was done by the plaintiff after he knew of the forgery is admissible.

CONTRACT, to recover the amount of two checks payable to the plaintiff and signed by the defendant. Trial in the Superior Court, without a jury, before *Dunbar*, J., who found for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

The case was argued at the bar in November, 1897, and afterwards was submitted on briefs to all the justices.

L. S. Dabney, for the defendant.

W. C. Loring, for the plaintiff.

BARKER, J. The plaintiff sues upon two checks drawn by the defendant upon his banker, one for $446.24, dated January 25, 1895, the other for $561.97, dated July 20, 1895. Both were written to the plaintiff's order, and were mailed by the defendant to the plaintiff in payment of bills for goods bought by the defendant of the plaintiff. Each check was duly received by the plaintiff, and the bills for which the checks were sent in payment were duly receipted by the plaintiff, and returned to the defendant, one on January 26, 1895, and the other on July

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24, 1895. The check for January 25, 1895, was presented at the bank on which it was drawn on January 30, 1895. It then purported to bear the indorsement of the plaintiff, and other indorsements, one of which was that of the cashier of the Merchants' National Bank of New Bedford, by whom it was presented, and on that day the amount of the check was paid by the National Bank of Wareham, on which it was drawn, to the Merchants' National Bank of New Bedford, and the same amount was charged to the defendant's account by the National Bank of Wareham. This check was returned to the defendant by his bank on June 25, 1895, and remained in his possession until January 30, 1896.

The check of July 20, 1895, was drawn upon the National Bank of Wareham, and was presented to that bank on July 29, 1895, purporting to bear the plaintiff's indorsement and other indorsements, one of which was that of the cashier of the Merchants' National Bank of New Bedford, and on that day the amount of the check was paid by the National Bank of Wareham to the Merchants' National Bank of New Bedford, and was charged to the defendant's account by the National Bank of Wareham, and this check was returned by that bank to the defendant on November 29, 1895, and remained in his possession until January 30, 1896.

The evidence tended to show that the indorsements upon these checks purporting to be those of the plaintiff when they were paid by the Wareham National Bank were forgeries made by a clerk in the employment of the plaintiff, which clerk had feloniously converted the checks to his own use, had forged upon them the plaintiff's indorsements, and had deposited the checks with the forged indorsements to his own credit in the Old Colony Trust Company, by which they were collected of the Wareham National Bank through the Merchants' National Bank of New Bedford. It appeared that the plaintiff, on January 29, 1896, was informed of these forgeries, and of the misappropriation by its clerk of these checks. Thereupon the plaintiff sent one Gray to the defendant to procure the checks, and the defendant handed them to Gray on January 30, 1896, under circumstances which the defendant offered to show, but evidence of which was excluded. On the same day, or the next day, the

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plaintiff notified the indorsers of the checks that the plaintiff's indorsements upon them were forgeries. The plaintiff gave no such notice to the National Bank of Wareham, and no other notice, except the oral statements of Gray made in obtaining the checks from the defendant on January 30, 1896, was given by the plaintiff to the defendant until February 10, 1896, when the plaintiff wrote to the defendant a letter which stated that the checks bore forged indorsements of the plaintiff.

On February 12, 1896, the plaintiff indorsed the checks upon allonges, and forwarded them to its bankers for collection from the Wareham National Bank. Payment was refused by that bank, and the checks were protested by a notary public for nonpayment on February 14, 1896, after which this suit was brought upon them by the plaintiff, the payee, against the defendant, the drawer of the checks.

The National Bank of Wareham is solvent.

The case was tried by a judge of the Superior Court, without a jury, and after a finding for the plaintiff, the defendant's exceptions are before us for consideration. It appears from the bill of exceptions that at the trial much evidence was admitted *de bene*, which was afterwards stricken out at the plaintiff's request, and also that much evidence offered by the defendant was excluded. Two findings of specific facts were made in connection with the refusal of the court to give rulings asked by the defendant at the close of the evidence. The questions for decision will be better understood after a statement of the facts which the evidence introduced or offered tended to prove in addition to those already recited.

The plaintiff is a dealer in lumber, with its place of business in Boston. The defendant is a dealer in lumber, with his place of business in Bourne. The defendant had been dealing with the plaintiff for some ten years, buying lumber of the plaintiff once in three or four months. When he bought lumber the plaintiff sent him a bill, and he usually paid it by mailing back the bill with a check for the amount. A receipted bill was then returned to him, in which payment was usually acknowledged for the plaintiff by Harry M. Fowle, who had authority so to do, and who was the clerk who forged the plaintiff's indorsements upon the checks in suit, and converted them to his own use.

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Fowle entered the plaintiff's employment in January, 1889, at the age of seventeen or eighteen, in answer to an advertisement, and was first set to do office boy's work. In 1893, when twenty-one years old, he became the ledger clerk, and so continued until his arrest in January, 1896. There were ten or more persons in the plaintiff's office, including its president, treasurer, and directors. Its treasurer was H. B. Shepard, and its cashier was H. S. Shepard, who took care of the money, kept the cash account, and made entries on the cash books. Fowle's duties were to receive and open letters, look over checks, statements, and settlements of accounts as they came in, and see that they were proper and in accordance with the ledger, to receipt and return to customers their paid bills, to post to the ledger, and to take off trial balances. Accounts of the plaintiff's business were kept in the ledgers, cash book, bill books, journals, and check books, and a trial balance was taken by Fowle each month of the business of the last preceding month. The treasurer had his desk in the office, and at his pleasure had access to all the books, and he occasionally examined the books and the trial balances.

The letters received were often opened by Fowle, and when not opened by him those which contained checks in payment for merchandise were placed with the bills upon his desk for him to examine the bills and the ledger with the checks, and see if the proper settlement had been made, and to receipt the bills and return them receipted to the customer. It was Fowle's duty after the examination to pass the checks to the cashier, and at the close of the day to give him a list of the payments, and this course of business was known to the treasurer, and was pursued with the authority and assent of the plaintiff.

The checks sued upon, with the accompanying bills, were received by mail at the office, each within a day or two after its date, and, in the usual course of business, were placed upon Fowle's desk, and intrusted to him for the usual examination, and to be thereafter handed to the cashier as usual. A receipted bill for the payment by each of these checks was sent to the defendant, the acknowledgment of payment being stamped upon the bill with a stamp furnished for that purpose by the plaintiff, and which Fowle had authority to use in receipting bills.

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The plaintiff's name, as it appears in the forged indorsements, was stamped upon the backs of the checks with a stamp which the plaintiff provided to be used in making indorsements, and which was kept with other stamps in the office in the cashier's desk. The words, "H. B. Shepard, Treas.," following the plaintiff's name in the indorsements, were written by Fowle. He also sometimes stamped the checks which were to be deposited by the plaintiff with another stamp provided by the plaintiff, and to which Fowle had access, and which stamped on them the words, "For deposit only to the credit of Shepard & Morse Lumber Co."

After the receipt by the plaintiff of the check of January 25, 1895, and the return to the defendant of the receipted bill acknowledging payment, and before the giving of the check of July 20, 1895, the defendant bought of the plaintiff two other invoices of lumber, and paid for them in the same way, with his checks mailed to the plaintiff with the bills which had been sent out by the plaintiff, and neither of these bills contained any reference to any other unpaid bill, and he received in due course receipts acknowledging the payment of both of the intervening bills.

The two bills for which the checks sued upon were given appeared, by the plaintiff's ledger, to have been paid, and in each instance the amount of the check was credited to the defendant in the ledger account in Fowle's handwriting, with a reference in each instance to a page which should have been a page of the cash book, but the cash book had no corresponding items. An examination of the books after the credit of the check of January 25, 1895, to the defendant's account in the ledger, would have shown that no such payment appeared upon the cash book. The trial balance made by Fowle at the end of January, 1895, was forced by him, by omitting from the entry of sundries credited to merchandise on January 31, a sum equal to the amount of the check. If this trial balance had been made up by an honest clerk, the loss of the check of January 25, 1895, would have been then discovered, and, in like manner, if the plaintiff's trial balance for July, 1895, had been made up by an honest clerk, the loss of the check of July 20, 1895, would have been discovered in August, 1895.

Fowle had been defrauding the plaintiff for two or three years before January, 1896, by taking checks sent in by its customers

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in payment, falsely indorsing them as he indorsed the checks in suit, collecting them for his own benefit, and concealing these frauds by crediting the checks upon the ledger to the persons who sent them in payment, deducting the amounts from the monthly credits to merchandise, and forcing the trial balances, so that if the monthly trial balances made before January, 1895, had been made by an honest clerk, the stealings of Fowle would have been discovered before that time. During the same period he had defrauded the plaintiff in other ways. The whole amount which he had taken from the plaintiff by misappropriating about one hundred checks of customers was more than $40,000. He kept a complete list of all the checks and money which he had taken. From some time in 1893 he had a deposit account with the Old Colony Trust Company, and he deposited to his credit in that account the checks in suit, and also most of the other checks belonging to the plaintiff and payable to its order, on which he forged its indorsement, and which he converted to his own use in a similar way. He also deposited to his own credit in the same account, from time to time, other funds, and from time to time he drew checks upon the Old Colony Trust Company against this account. Through February and March and August and September, 1895, he had money to his credit on deposit in the Old Colony Trust Company, and also in January, 1896.

In December, 1895, and two or three times before that, the plaintiff's treasurer had his attention called to the fact that Fowle was spending more than his salary, and in consequence the treasurer, in December, 1895, looked over the journal and the ledger to some extent, but he made no other examination of the books, and had no one else make any examination. On January 27, 1896, the plaintiff's treasurer was told by one of the plaintiff's clerks that Fowle had deposited to his own credit in the Old Colony Trust Company checks payable to the plaintiff's order. The treasurer thereupon ascertained from the Trust Company that Fowle had deposited with it such checks, and requested the Trust Company to have the banks upon which the checks were drawn return them, so that he could see the indorsements. He then consulted an attorney. Fowle owed the plaintiff a bill for lumber, and on January 28, 1896, the plaintiff, through its treasurer, took from Fowle a check for $193.20,

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upon the Old Colony Trust Company, in payment of the lumber bill, which was for lumber used in building a house of Fowle's in Clifton. This check was paid by the Trust Company on January 29, 1896. On that day Fowle was arrested at the instance of the plaintiff, and upon that day he gave to the plaintiff's treasurer a complete list of all the plaintiff's checks which he had misappropriated by forgery, including the checks now in suit. On the same day the plaintiff brought suit against Fowle in an action of tort or contract, in which the damages were laid at $10,000, and on the writ real estate belonging to Fowle was attached. The declaration was for money obtained by false representations, or wrongfully taken or embezzled, but did not include the checks now in suit. A judgment for the plaintiff has been entered in the suit, upon which execution has issued. Before Fowle's arrest and after the plaintiff's treasurer knew that checks payable to the plaintiff's order had been deposited by Fowle to his own credit in the Old Colony Trust Company, another check, drawn for $140 by Fowle upon that company, was, on January 29, 1896, with the consent of the plaintiff, paid by the Old Colony Trust Company, and charged against Fowle's deposit.

On the same day, after obtaining from Fowle the full list of misappropriated checks, including the checks in suit, the plaintiff sent one Gray to the defendant to obtain the checks in suit. Gray got them, and brought them to the plaintiff's treasurer on January 30 or 31. To obtain the checks, Gray told the defendant that the plaintiff wanted the two checks to see whether the indorsements were forgeries. The defendant, after finding the checks among the vouchers returned from his bank, said he did not think they were forgeries; that the signatures looked like Shepard's; and the defendant got out some letters with Shepard's signature and compared them, and thought the indorsements were not forgeries, and so stated. Gray asked to have the checks, telling the defendant that the purpose for which he wanted them was for a prosecution for forgery, and that if they turned out to be forged no harm should come to the defendant in letting them go out of his possession. On the faith of these assurances, and on the further statement of Gray that the checks should be returned to the defendant when the prosecution for

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forgery should be finished, and on the faith of a written receipt the defendant allowed Gray to take the checks. The receipt was of the following tenor:

"Bourne, Mass., Jan. 30, 1896.

"Received of A. R. Eldridge Paid Checks, no number, dated Jan. 25th and July 20, 1895, amounting to 446.24 and 561.97, respectively. To be returned when the case is finished.

"Shepard & Morse L. Co.,
per Geo. F. Gray."

When the plaintiff's treasurer, on January 30 or 31, got these checks from Gray, he immediately saw that the indorsements of his signatures thereon were forgeries, and he immediately gave notice to all the indorsers, except Fowle, that those indorsements were forgeries, but he gave no notice at that time to the National Bank of Wareham, and he gave no notice to the defendant until February 10, 1896, when he sent a letter of the following tenor:

"Boston, February 10, 1896.

"Mr. A. R. Eldridge, Bourne, Mass.

"Dear Sir,—The Shepard & Morse Lumber Company desires to acknowledge the receipt from your concern of the following checks drawn by you on the National Bank of Wareham, Mass., payable to the order of the Shepard & Morse Lumber Company, and all bearing forged indorsements, Shepard & Morse Lumber Company, H. B. Shepard, Treas.

"Date Jan. 25, 1895, amount $446.24; date July 20, 1895, amount $561.97.

"Shepard & Morse Lumber Co.,
By H. B. Shepard, Treas."

The first notice of the forgeries which is shown to have been given to the Wareham National Bank is that which was contained in the plaintiff's indorsements upon the allonges, stating that the checks were for the first time indorsed by the Shepard and Morse Lumber Company by those indorsements dated February 12, 1896, and that no prior indorsements were recognized, which allonges annexed to the checks were presented to the Wareham Bank on February 14, 1896, when payment of the checks was demanded and refused.

Besides his pay from the plaintiff, which was twenty dollars a

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week, and his deposit in the Old Colony Trust Company, Fowle had other property. Soon after he became the ledger clerk he told the plaintiff's treasurer that he had inherited considerable property from his father, who had been a partner in Fowle, Torrey, and Company, carpet dealers in Boston, and that he was not obliged to work. In December, 1895, the treasurer, after hearing that Fowle was spending more than his salary, inquired of a gentleman who might be supposed to know how much Fowle had inherited from his father. The reply was that Fowle did inherit, but that the gentleman did not know how much; that he judged from his style of living that he had inherited considerable property, but did not know, or have means of knowing, how much, and the treasurer made no further inquiry. On February 10, 1896, Fowle was absolutely insolvent, and has been so ever since.

The evidence offered by the defendant to prove many of the facts above recited was excluded at the trial, and, at the close of the evidence, so much of it as had been admitted *de bene*, and tended to prove lavish expenditures on the part of Fowle, and to show the extent of the plaintiff's losses by Fowle's depredations, was stricken out.

The defendant's requests for rulings, however, were framed as if all the evidence were in, and, in refusing them, the judge made two special findings of fact, which were, in substance, that the defendant's position had not been changed to his prejudice after the misappropriation of the checks by Fowle, and that Fowle was not permitted by the plaintiff's negligence to obtain payment of either check.

The requests for rulings were, in substance, that the plaintiff could not maintain the action; that the plaintiff's neglect after the discovery of the forgery of the indorsements to give notice of the same to the defendant until February 10 was an unreasonable delay, which of itself discharged the defendant; that it was an unreasonable delay which discharged the defendant if his position had in the mean time been changed to his prejudice; that the assurances given by the plaintiff through Gray on January 30, 1896, to induce the defendant to give up the checks then in his possession, and the receipt then given by Gray are an adoption and ratification of the indorsements and of the pay-

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ment of the checks thereon, so that the defendant cannot be held liable on the checks; also, that those assurances and the receipt estop the plaintiff from maintaining the action if the defendant's position was changed to his prejudice by giving up the checks, and that his position was so changed.

There were also requests with reference to the trial balances for February and July, 1896, to the effect that, if the examination of the books for making up the trial balances would have disclosed to an honest clerk the loss of the checks, and brought to the plaintiff's knowledge facts which, by the exercise of due care and diligence, would have disclosed the forgeries, the plaintiff cannot escape the knowledge to be thereby imputed to it because the examinations and trial balances were made by Fowle; that the plaintiff must be deemed to have had knowledge of the first forgery in February, 1895, and of the second in August, 1895, and cannot recover, because it did not give notice of the forgeries to the defendant at those times, and because of unreasonable delay after those dates in giving notice to the defendant, and because of the delay since those dates, if the defendant's position has been changed to his prejudice. There were also requests to the effect that, if Fowle was permitted by the negligence of the plaintiff to get possession of the checks, and to obtain payment on them, the plaintiff could not recover, and that, if in the month after each check were given, the plaintiff had means of knowledge that the check had been taken from it and collected by Fowle, and remained ignorant of those facts by reason of its want of ordinary care, the plaintiff could not recover on the check, and that in those circumstances it could not recover on the check, if, in the mean time, the defendant's position had been altered to his prejudice.

There was also a request to the effect that, if the plaintiff knew that the defendant was its regular customer, and that he had been buying lumber of it for years, paying for it with his checks sent to the plaintiff by mail, and that Fowle on the receipt of such checks was in the habit of receipting the bills and returning them to the defendant as paid, and that he was authorized so to do, and if the plaintiff knew, or had reason to believe, that the defendant relied upon the return of the receipts as evidence that his checks had been duly received by the plaintiff

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and had been duly honored, and had been collected by it, it was the plaintiff's duty to take reasonable care of such checks, and to use ordinary care in availing itself of the means of information in its possession to ascertain whether such checks were duly collected for its account, and it was bound to the defendant to know at any time when, by the use of ordinary care, it had the means of knowledge in its possession that it had lost without receiving payment any check so received from the defendant, and at once to inform the defendant thereof, and that a failure so to inform itself and to notify the defendant would discharge him.

There were further requests to the effect that the plaintiff's action in asking for and taking from Fowle the check given by him to the plaintiff on January 28, 1896, after the plaintiff knew that Fowle had deposited to his own credit checks payable to the plaintiff was a ratification by it of Fowle's appropriation to his own use of the checks, and that the plaintiff's action in requesting the Old Colony Trust Company to pay checks of Fowle's after the plaintiff had such knowledge was such a ratification.

One question for decision is whether the plaintiff can recover if, by its own negligence in the conduct of its business, Fowle was in its employ and intrusted with the possession of the checks, when ordinary care would have shown the plaintiff that Fowle was dishonest, and had already stolen from it and collected by forging the plaintiff's indorsement many checks previously sent to it by its customers.

The finding of fact that Fowle was not permitted by the negligence of the plaintiff to obtain payment of either check does not render this question immaterial, because, if the plaintiff's negligence in this regard was a material consideration, much evidence relevant to it was stricken out or excluded, and the finding made without considering that evidence has no weight. It is apparent that the judge below considered such negligence on the part of the plaintiff wholly immaterial. If it was so, the exclusion of evidence tending to establish it did the defendant no harm; but the finding of fact must be laid one side, and, notwithstanding that finding, we must inquire whether the plaintiff's negligence, if it could be found from the evidence offered, was a defence.

The doctrine of contributory negligence as a defence to ac-

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tions of tort is now of most frequent application, but we have been referred to no instance in which it has been held applicable to actions upon commercial paper, or even when the holder of such paper sues in tort for its conversion one who has innocently taken it upon a forged indorsement. Nothing could more completely unsettle commercial dealings than to extend that doctrine to suits brought by holders of negotiable paper against other parties thereto. If any change is to be made in the law looking to the discouragement of negligence on the part of holders of such paper, and to the protection of parties who may be defrauded by the forgery of indorsements, it should be made by the Legislature, as in the case of the English statutes as to indorsements of checks and bills upon bankers. See St. 16 & 17 Vict. c. 59, § 19; 45 & 46 Vict. c. 61, § 60.

We are of opinion that the holder of an unindorsed check, payable to his own order, is under no legal obligation to the drawer to exercise care as to how the check shall be kept, or to whom he shall commit its custody, or to see to it that the check shall not be put in circulation by the forgery of his indorsement, so long as he acts honestly without collusion. Such a holder is not deprived of his remedy against the drawer by merely negligently intrusting such a check to a clerk who, due care would have told him, was dishonest, and thus giving the clerk an opportunity to commit crime. He has the right to assume that his clerk will not commit a crime, and to rest upon the presumption that he has not stolen or forged, and will not do so, and he is under no legal obligation, either to the drawer of the check or to the public, to see to it that the check is not put in circulation with a forged indorsement. *Combs* v. *Scott*, 12 Allen, 493, 497 *Belknap* v. *National Bank of North America*, 100 Mass. 376 *Greenfield Savings Bank* v. *Stowell*, 123 Mass. 196. *Mackintosh* v. *Eliot National Bank*, 123 Mass. 393, 395. *Mount Morris Bank* v. *Gorham*, 169 Mass. 519, 521. *Patent Safety Gun Cotton Co.* v. *Wilson*, 49 L. J. Q. B. (N. S.) 713. *Société Générale* v. *Metropolitan Bank*, 27 L. T. (N. S.) 849, 858. *Scholfield* v. *Londesborough*, [1896] App. Cas. 514. *Bank of Ireland* v. *Evans Charities*, 5 H. L. Cas. 389. *Ogden* v. *Benas*, L. R. 9 C. P. 513. *Fine Art Society* v. *Union Bank*, 17 Q. B. D. 705. *Swan* v. *North British Australasian Co.* 2 H. & C. 175, 189. *Arnold* v. *Cheque Bank*, 1 C. P. D. 578, 588.

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Such a holder of a negotiable check is under no other legal obligations with reference to it than those which rest upon any holder of commercial paper completed and put in circulation by the maker. If the check is stolen from him and put in circulation by means of the forgery of his indorsement, he is not answerable as is one who intrusts to another his signature or indorsement in blank with authority to use it in making or giving currency to negotiable paper. The doctrine of *Putnam* v. *Sullivan*, 4 Mass. 45, and of *Young* v. *Grote*, 4 Bing. 253, does not apply, and it cannot properly be extended to the case of a completed check already in circulation and intrusted by the holder to a clerk for purposes which neither give nor imply any authority to pass it on to another holder, nor give the clerk any power to do so, without the commission of a crime.

It is not necessary now to determine whether the debts for which the checks were given were extinguished. If the checks were taken by the plaintiff in absolute extinguishment of the debts, that circumstance could not relieve the drawer from his legal obligations as drawer. While the drawer has done his duty, and it is through no fault of his that the payee does not get his money, if the check is stolen from him and collected upon a forged indorsement, that does not furnish a sufficient reason why the loss should remain upon the payee rather than fall upon the drawer. The check was received in payment and the debt extinguished only in consideration of the drawer's legal obligation as drawer and of the payee's rights as holder, which included the right of recourse to the drawer if upon proper indorsement and due demand the check should not be paid by the drawee. Although there are intimations in support of the theory that cases like the present are instances in which as to two innocent parties losses are to be left where they fall, we think the rights of the present parties must be worked out by considering the usual rights of the drawer and drawee of a check given in a commercial transaction. See *Thomson* v. *Bank of British North America*, 82 N. Y. 1, 8; Morse, Banks & Banking, § 395.

The fact that the defendant had been in the habit of buying goods of the plaintiff for ten years, and of making payment by checks, imposed no liability upon the plaintiff as to the methods

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in which its own business should be conducted, or as to what clerks it should employ. So far as these checks are concerned, its obligations to the defendant were merely those defined by the law of negotiable paper, and did not include the duty of taking care that the checks should not be stolen or its indorsement forged.

Nor do we think that the plaintiff is to be charged with the knowledge that the checks had been stolen or embezzled, and collected upon its forged indorsements, either because Fowle, its clerk, had that knowledge, or because the means of knowledge existed in the plaintiff's books of account, so that the plaintiff would have made the discovery if its monthly trial balances had been made by an honest clerk. The loss of the checks to the plaintiff was not, in fact, known to it until Fowle's arrest on January 29, 1896, and, as to all other parties to the checks, they were never lost checks. One was paid in four days, and the other in nine days after its date; and they were thenceforth in the custody of the drawee or drawer. Assuming that the owner of a check which he knows to be lost is under a duty to give to the public and to the parties to the check immediate notice of the loss, we see no reason for holding that one who has become the holder of a check is under a duty to give notice to the drawer and the drawee, or to the public, as of a lost check, if the check is in fact stolen and collected upon a forged indorsement, and he remains honestly ignorant of those facts, and incorrectly, but honestly, assumes that it has been collected in the regular course of his business.

Unless the plaintiff was under a duty to give notice as of a lost check, there was no duty to any one connected with the checks which required the plaintiff to examine its books of account, or to make trial balances, or to discover by any means what had become of the checks. Assuming that, if such a duty toward other parties had rested upon the plaintiff, it would be chargeable with the knowledge which Fowle had, or which would have been acquired by the making of the trial balances by an honest clerk, or by an examination of the plaintiff's books by its officers, as the depositor was chargeable with the knowledge of his dishonest clerk to whom he intrusted the examination of returned checks in *Dana* v. *National Bank of Republic*,

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132 Mass. 156, since no such duty to others rested upon the plaintiff, it is not to be charged with knowledge which it did not in fact have. Fowle was himself defrauding the plaintiff in forging the plaintiff's indorsement and collecting the checks for his own use, and therefore his own knowledge of the fraud acquired in its perpetration is not to be imputed to the plaintiff. *Indian Head National Bank* v. *Clark*, 166 Mass. 27, and cases cited. Nor is this contended. And as the examinations of the books in making the trial balances were not made in the performance of a duty owed by the plaintiff to any other party, the knowledge of the agent who made those examinations is not to be imputed to the plaintiff, nor is it to be charged with the information which its means of knowledge disclosed, it not being wilfully ignorant, nor having purposely neglected to use the means of knowledge within its power. *Combs* v. *Scott*, 12 Allen, 493, 497.

As the plaintiff cannot properly be charged with imputed knowledge that Fowle was indorsing with its name these checks, or any of the other checks which he stole or embezzled and collected by forging its indorsement, we find nothing in what occurred until the plaintiff obtained actual knowledge of the frauds to work an actual or implied adoption or ratification of Fowle's acts in indorsing the checks with the plaintiff's name or in collecting them. The want of actual knowledge is fatal. *Combs* v. *Scott*, 12 Allen, 493. *Murray* v. *Nelson Lumber Co.* 143 Mass. 250. *Dole Brothers Co.* v. *Cosmopolitan Preserving Co.* 167 Mass. 481. The receipting of subsequent bills by the plaintiff without informing the defendant that the debts for which these checks were given had not been extinguished was not an act intended or designed to convey to the defendant any representation as to what had become of the checks in suit, and could not justify the defendant in his inference that the checks had been collected by the plaintiff so as to estop the plaintiff from showing the truth. The receipting of subsequent bills without mention of the previous checks was not done with the intent to mislead the defendant, nor with any expectation or reason to believe that the defendant would in consequence of it do or omit to do anything with reference to the checks now in suit. *Stiff* v. *Ashton*, 155 Mass. 130. *Lincoln* v. *Gay*, 164 Mass. 537. *Traders' National Bank* v. *Rogers*, 167 Mass. 315, 321.

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The remaining question is, whether what occurred after the actual discovery of the frauds requires us to sustain the defendant's exceptions. It is not necessary to consider whether the payee of a check, which has been stolen from him, put in circulation by forgery, and paid by the drawee, upon ascertaining those facts, should give notice to the maker, and to those who have taken the check as rightfully in circulation, of such facts within the payee's knowledge as are material to the rights and obligations of such persons, growing out of their transactions with the check. A majority of the court is of the opinion that a payee who, under such circumstances, misleads the drawer to his prejudice, and thereby places him in a worse position than he would otherwise be in with reference to the assertion or protection of his rights resulting from what has been done with the check, is thereby estopped from maintaining an action against the drawer upon the check, and that, for this reason, the exceptions should be sustained, and the finding for the plaintiff should be set aside.

It is true that it was found specially that the defendant's position had not been changed to his prejudice. But this finding must be disregarded, because evidence relevant and material to the question was offered by the defendant and wrongly excluded, even if the finding was correct upon the evidence admitted, which we do not decide. The evidence offered and excluded to show upon what footing and by what representations and assurances the plaintiff through Gray got the checks from the defendant was material upon the questions whether the plaintiff was estopped by its own acts done after its discovery of the forgeries from collecting the checks of the defendant; and whether the plaintiff had adopted as to him the forged indorsements. So also the evidence of the plaintiff's acts between its discovery of Fowle's frauds and its demand for payment of the checks from the drawee on February 14 was material in determining whether the defendant had been prejudiced in his rights to recover against the drawee.

To say nothing of the plaintiff's omission to notify the defendant of its own purpose to treat the checks as unpaid checks and to collect them of the defendant, the plaintiff's act in getting the checks from the defendant on January 30 as paid

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checks was intended by the plaintiff to change the defendant's position, and did change it by depriving him of the possession of the checks. They had come to the defendant's hands honestly, and as vouchers for charges made against him by the drawee. Even if they had been demanded of him by the plaintiff as its property, the defendant could honestly refuse to give them up, and could honestly at once return them to the drawee with notice of the facts, and thus save himself from loss by perfecting his right to recover from the drawee the amount of the unauthorized payments which the drawee had charged against him in account. See *Northampton National Bank* v. *Smith*, 169 Mass. 281.

The enforcement of the defendant's rights against the drawee was not so plain and easy for him without as with the possession of the checks, and the loss of possession itself might have been found a change in his position to his prejudice. Besides this, the plaintiff's act in getting the checks from the defendant as paid checks, without notifying him that the plaintiff claimed them as its own property, and intended to collect them, while at the same time giving the defendant information that the plaintiff's indorsements were forged, would naturally induce the defendant to omit to give information of the forgery to the drawee, and it does not appear that any information was given to the drawee until the checks were again demanded of it on February 14. The fact that the drawee has always been solvent, and remains solvent, is not the only factor in determining whether the defendant has lost his rights against the drawee. See *Dana* v. *National Bank of Republic*, 132 Mass. 156; *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96; *Leather Manufacturers' Bank* v. *Merchants' Bank*, 128 U. S. 26.

Without discussing that question, we think the evidence as to what was done by the plaintiff after it knew of the forgeries should have been admitted, and that if it appeared that the plaintiff got the checks from the defendant as paid checks, to be returned to him, and did not properly notify the defendant that the plaintiff claimed the checks as unpaid and as its own property, and that it intended to assert that ownership and collect the checks, a finding for the defendant would be warranted.

Exceptions sustained.

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GEORGE S. WINSLOW & another *vs.* EVERETT NATIONAL BANK.

Suffolk. November 15, 1897. — June 29, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Check — Forged Indorsement — Assignment — Action — Defence.

To an action against a bank to recover a sum deposited with it, with a count for refusing to honor a check for the same amount which has been paid to a holder under a forged indorsement and payment refused under a true indorsement made later after the discovery of the forgery, it is no defence that the nominal plaintiff's debt to the payee has been satisfied, either by the check or by the subsequent assignment of the cause of action to the payee, who sues in the name of the depositor, and that the latter has suffered only nominal damages.

CONTRACT, to recover $618.87, deposited by the plaintiffs with the defendant, with a count for refusing to honor a check for the same amount. Trial in the Superior Court, without a jury, before *Hardy*, J., who found for the plaintiffs; and the defendant alleged exceptions. The facts appear in the opinion.

The case was argued at the bar in November, 1897, and afterwards was submitted on briefs to all the justices.

S. Lincoln & W. I. Badger, (*W. M. Noble* with them,) for the defendant, submitted the case on a brief.

W. C. Loring, (*C. R. Clapp* with him,) for the plaintiffs.

HOLMES, J. This is an action in the name of a depositor in the defendant bank to recover a sum deposited with it, with a count for refusing to honor a check for the same amount. The check was given by the plaintiffs to the Shepard and Morse Lumber Company, and was abstracted by Fowle and used in the way explained in the previous case. *Shepard & Morse Lumber Co.* v. *Eldridge*, *ante*, 516. The defendant paid a holder under an indorsement forged by Fowle, and refused to pay the holder under a true indorsement made at a later time after the forgery had been discovered. This action is brought by the lumber company in the name of the plaintiffs by virtue of an assignment from the latter. The defendant sets up as defences the alleged

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negligence of the lumber company in giving Fowle a chance to commit his fraud, and that the nominal plaintiffs' debt to the lumber company has been satisfied, either by the check or by the subsequent assignment, and therefore that the nominal plaintiffs have suffered only nominal damages.

The defence based on the carelessness of the lumber company is disposed of in the last case and it is unnecessary therefore to ask how, if a contract is good as to the contractor or a debt is due to a creditor, it can be invalidated by being assigned.

The other defence is *res inter alios*. The bank becomes the plaintiffs' debtor for the money had and received. Nothing but payment, accord and satisfaction, or a release under seal, is an answer to the plaintiffs' demand. *Leather Manufacturers' Bank* v. *Merchants' Bank*, 128 U. S. 26, 34.

It is no concern of the bank whether the plaintiffs owe the lumber company or not. But, further, the plaintiffs' debt is not paid if the check is not paid, as it has not been, or at most the plaintiffs' liability is only changed to a liability on the check, a change which would be a curious reason for holding the bank exonerated from paying the check.

Whether a depositor whose check has been paid upon a forged indorsement, and returned to and held by him as a voucher in the account between himself and his bank, and who again puts the check in circulation by redelivering it to the payee whose indorsement has been forged, can maintain an action against the bank for refusing to honor the check upon its second presentation without notifying the bank before such second presentation that its payment of the check was unauthorized, and that he has again put the check in circulation, was not raised at the trial, and was not argued in this court, and upon that question we express no opinion.

Exceptions overruled.

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EDWARD E. STONE *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Worcester. October 7, 8, 1897. — July 1, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Loss of Property by Fire — Railroad — Negligence — Remoteness of Cause — Action.

Although a railroad corporation is negligent in storing oil on the platform of its freight house in a town, it is not liable for the loss of adjacent buildings by fire caused by the careless act of a person not in its employ and rightfully on its premises, and which ignites the oil and spreads to the buildings. KNOWLTON, J. dissenting.

TORT, for the loss of the plaintiff's property by fire caused by the alleged negligence of the defendant. Trial in the Superior Court, before *Hopkins*, J., who ruled that the plaintiff could not recover, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

The case was argued at the bar in October, 1897, and afterwards was submitted on briefs to all the justices except *Holmes*, J.

W. S. B. Hopkins, (*C. M. Rice & H. W. King* with him,) for the plaintiff.

F. P. Goulding, for the defendant.

ALLEN, J. This is an action of tort to recover for the loss of the plaintiff's buildings and other property by fire, under the following circumstances. The defendant owned and operated a branch railroad extending from its main line at South Spencer to the village of Spencer, and had at the Spencer terminus a passenger station, a freight house, and a freight yard, all adjoining a public street. On the side of the freight house, and extending beyond it about seventy-five feet, was a wooden platform about eight feet wide and four feet high, placed upon posts set in the ground, the under side being left open and exposed. The main tracks ran along on the front side of this platform

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and freight house, and on the rear of the platform there was a freight track, so near as to be convenient to load and unload cars from and upon it. The plaintiff was engaged in the lumber business, buying at wholesale, and selling at wholesale and retail, manufacturing boxes, etc. His place of business comprised several buildings, some of which were across the street from the defendant's buildings; and his principal buildings were about seventy-five feet from the place on the defendant's premises, beneath the platform, where the fire originated. The evidence tended to show that the platform was mostly used for the storing of oil which had been brought upon the railroad, until it was taken away by the consignees; and that the platform had become thoroughly saturated with oil which had leaked from the barrels, and which not only saturated the platform but dripped to the ground beneath. More or less rubbish accumulated from time to time under the platform, and was occasionally carried away. The evidence tended to show that this space below had been cleaned out two or three weeks before the fire. On the day of the fire, September 13, 1893, from twenty-five to thirty barrels of oil and oil barrels were upon the platform. Some were nearly or quite empty, some were partly full, but most of them were probably full or nearly full. The only evidence to show how the fire originated tended to prove that one Casserly, a teamster, brought a load of boots to be shipped upon a car which was standing upon the track on the rear side of the platform; that he was smoking a pipe; that he stepped into the car to wait for the defendant's foreman of the yard, who was to help him unload the boots; that in stepping in he stubbed his toe and knocked some of the ashes and tobacco out of his pipe; that he relighted the pipe with a match, and threw the match down; and that at this time he was standing in the door of the car, facing the platform. It must be assumed, upon the evidence, that the fire caught upon the ground underneath the platform from the match thrown down by Casserly. All efforts to extinguish the fire failed; it spread fast and was almost immediately upon the top of the platform, running up a post according to one of the witnesses, and very soon it reached the barrels of oil, which began to explode, and the fire communicated to the plaintiff's buildings, and they were burned.

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There was evidence tending to show that all of the oil had been upon the platform for a longer time than forty-eight hours. According to the testimony of the plaintiff, the platform was never to his knowledge empty of oil and oil barrels, it was completely saturated with oil, and that general condition of things, so far as the platform was concerned, had existed for eight years, ever since he himself had been there. Upon the evidence introduced by the plaintiff, the court directed a verdict for the defendant.

The plaintiff in substance contends before us that the defendant was negligent in storing oil upon the platform, taking into consideration the condition of the platform and of the ground and material under it, and the length of time during which the oil had been allowed to remain there; that, irrespectively of the question of negligence, the platform with the oil upon it constituted a public nuisance, especially in view of Pub. Sts. c. 102, § 74, providing that oil composed wholly or in part of any of the products of petroleum shall not be allowed to remain on the grounds of a railroad corporation in a town for a longer time than forty-eight hours, without a special permit from the selectmen; that the defendant is responsible for the damage resulting from the public nuisance, whether the act of starting the fire was due to a third person or not; and that the question should have been submitted to the jury whether the damage to the plaintiff's property was the natural and proximate consequence of the defendant's tort.

Upon the evidence, the supposed tort of the defendant, whether it be called negligence or nuisance, appears to have been limited to the keeping of oil too long upon the platform. Assuming this oil to have been a product of petroleum, and so within the statute cited, nevertheless the defendant as a common carrier was bound to transport it, and deliver it to the consignees. The oil, as is well known, was an article of commerce and in extensive use, and the defendant was bound to transport it and to keep it for a reasonable time after its arrival in Spencer, in readiness for delivery. There was no evidence that the oil was liable to spontaneous ignition, or that the platform was an unsuitable place for its temporary storage till it could be removed, or that the defendant could have prevented the escape of oil upon

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the platform from leaky barrels. But we may assume without discussion that the defendant was in fault in keeping the oil there so long, and that if the oil had been removed within forty-eight hours after its arrival the fire would probably not have been attended with such disastrous consequences.

Nevertheless the question remains, and in our view this becomes the important and decisive question of the case, whether, assuming that the defendant was thus in fault, the plaintiff introduced any evidence which would warrant a finding by the jury that the damage to his property was a consequence for which the defendant is responsible; or, in other words, whether the act of Casserly in starting the fire was such a consequence of the defendant's original wrong in allowing the oil to remain upon the platform that the defendant is responsible to the plaintiff for it.

In approaching this question, it must be borne in mind that Casserly was in no sense a servant, agent, or guest of the defendant. He brought a load of goods to the defendant's station to be carried upon the defendant's railroad. The defendant was bound by law to accept and carry them. It could not lawfully exclude Casserly from its grounds. By Pub. Sts. c. 112, § 188, it was bound to give all persons reasonable and equal terms, facilities, and accommodations for the transportation of merchandise upon its railroad, and for the use of its depot and other buildings and grounds. Casserly came there in his own right, and the defendant is not responsible for him in the same way that perhaps it might be responsible for a servant, agent, or, according to some statements of the law, guest. *Lothrop* v. *Thayer*, 138 Mass. 466. It is also to be borne in mind that this was not a case of spontaneous ignition of a substance liable to ignite spontaneously, as was the case in *Vaughan* v. *Menlove*, 3 Bing. N. C. 468. Nor did the defendant owe to the plaintiff the duties of a carrier of passengers or freight towards its customers, or any other duties growing out of a contract with the plaintiff. There was no contract of any kind between the plaintiff and the defendant.

The rule is very often stated that in law the proximate and not the remote cause is to be regarded; and in applying this rule it is sometimes said that the law will not look back from the injurious consequence beyond the last sufficient cause, and

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especially that where an intelligent and responsible human being has intervened between the original cause and the resulting damage, the law will not look back beyond him. This ground of exonerating an original wrongdoer may be found discussed or suggested in the following decisions and textbooks, amongst others. *Clifford* v. *Atlantic Cotton Mills*, 146 Mass. 47. *Elmer* v. *Fessenden*, 151 Mass. 359. *Hayes* v. *Hyde Park*, 153 Mass. 514. *Freeman* v. *Mercantile Accident Association*, 156 Mass. 351. *Lynn Gas & Electric Co.* v. *Meriden Ins. Co.* 158 Mass. 570. *Mutual Ins. Co.* v. *Tweed*, 7 Wall. 44. *Milwaukee & St. Paul Railway* v. *Kellogg*, 94 U. S. 469. *Washington & Georgetown Railroad* v. *Hickey*, 166 U. S. 521. *Reiper* v. *Nichols*, 31 Hun, 491. *Mars* v. *Delaware & Hudson Canal*, 54 Hun, 625. *Read* v. *Nichols*, 118 N. Y. 224. *Leavitt* v. *Bangor & Aroostook Railroad*, 89 Maine, 509. *Cuff* v. *Newark & New York Railroad*, 6 Vroom, 17. *Delaware, Lackawanna, & Western Railroad* v. *Salmon*, 10 Vroom, 299. *Curtin* v. *Somerset*, 140 Penn. St. 70. *Pennsylvania Co.* v. *Whitlock*, 99 Ind. 16. *Goodlander Mill Co.* v. *Standard Oil Co.* 63 Fed. Rep. 400, 405. Shearman, Negl. §§ 38, 666. Whart. Negl. §§ 134 *et seq.*

It cannot, however, be considered that in all cases the intervention even of a responsible and intelligent human being will absolutely exonerate a preceding wrongdoer. Many instances to the contrary have occurred, and these are usually cases where it has been found that it was the duty of the original wrongdoer to anticipate and provide against such intervention, because such intervention was a thing likely to happen in the ordinary course of events. Such was the case of *Lane* v. *Atlantic Works*, 111 Mass. 136, where it was found by the jury that the meddling of young boys with a loaded truck left in a public street was an act which the defendants ought to have apprehended and provided against, and the verdict for the plaintiffs was allowed to stand. In the carefully expressed opinion by Mr. Justice Colt the court say: "In actions of this description, the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening

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and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise." According to this statement of the law, the questions in the present case are, Was the starting of the fire by Casserly the natural and probable consequence of the defendant's negligent act in leaving the oil upon the platform? According to the usual experience of mankind, ought this result to have been apprehended? The question is not whether it was a possible consequence, but whether it was probable, that is, likely to occur, according to the usual experience of mankind. That this is the true test of responsibility applicable to a case like this has been held in very many cases, according to which a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience. One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable. A high degree of caution might, and perhaps would, guard against injurious consequences which are merely possible; but it is not negligence, in a legal sense, to omit to do so.

There may not always have been entire consistency in the application of this doctrine; but, in addition to cases of boys meddling with things left in a public street, courts have also held it competent for a jury to find that the injury was probable, although brought about by a new agency, when heavy articles left near an opening in the floor of an unfinished building, or in the deck of a vessel, were accidentally jostled so that they fell upon persons below; *McCauley* v. *Norcross*, 155 Mass. 584; *The Joseph B. Thomas*, 81 Fed. Rep. 578; when sheep, allowed to escape from a pasture and stray away in a region frequented by bears, were killed by the bears; *Gilman* v.

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Noyes, 57 N. H. 627; and when a candle or match was lighted by a person in search of a gas leak, with a view to stop the escape of gas; *Koelsch* v. *Philadelphia Co.* 152 Penn. St. 355; and in other cases not necessary to be specially referred to. In all of these cases, the real ground of decision has been that the result was or might be found to be probable, according to common experience.

Without dwelling upon other authorities in detail, we will mention some of those in which substantially this view of the law has been stated. *Davidson* v. *Nichols*, 11 Allen, 514. *McDonald* v. *Snelling*, 14 Allen, 290. *Tutein* v. *Hurley*, 98 Mass. 211. *Hoadley* v. *Northern Transportation Co.* 115 Mass. 304. *Hill* v. *Winsor*, 118 Mass. 251. *Derry* v. *Flitner*, 118 Mass. 131. *Freeman* v. *Mercantile Accident Association*, 156 Mass. 351. *Spade* v. *Lynn & Boston Railroad*, 168 Mass. 285, and cases there cited. *Cosulich* v. *Standard Oil Co.* 122 N. Y. 118. *Rhodes* v. *Dunbar*, 57 Penn. St. 274. *Hoag* v. *Lake Shore & Michigan Southern Railroad*, 85 Penn. St. 293. *Behling* v. *Southwest Penn. Pipe Lines*, 160 Penn. St. 359. *Goodlander Mill Co.* v. *Standard Oil Co.* 63 Fed. Rep. 400, 405, 406. *Haile* v. *Texas & Pacific Railway*, 60 Fed. Rep. 557. *Clark* v. *Chambers*, 3 Q. B. D. 327. Whart. Negl. (2d ed.) §§ 74, 76, 78, 138–145, 155, 955. Cooley, Torts, 69, 70. Add. Torts, 40. Pollock, Torts, 388. Mayne, Damages, 39, 47, 48. For a recent English case involving a question of remoteness, see *Engelhart* v. *Farrant*, [1897] 1 Q. B. 240. The rule exempting a slanderer from damages caused by a repetition of his words rests on the same ground. *Hastings* v. *Stetson*, 126 Mass. 329. *Shurtleff* v. *Parker*, 130 Mass. 293. *Elmer* v. *Fessenden*, 151 Mass. 359.

Tried by this test, the defendant is not responsible for the consequences of Casserly's act. There was no close connection between it and the defendant's negligence. There was nothing to show that such a consequence had ever happened before, during the eight years covered by the plaintiff's testimony, or that there were any existing circumstances which made it probable that it would happen. It was of course possible that some careless person might come along and throw down a lighted match where a fire would be started by it. This might, indeed, have happened upon the plaintiff's own premises, or in any other

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place where inflammable materials were gathered. But it was not according to the usual and ordinary course of events. In failing to anticipate and guard against such an occurrence or accident, the defendant violated no legal duty which it owed to the plaintiff. What qualification, if any, of this doctrine should be made in case of the storage of high explosives, like gunpowder and dynamite, we do not now consider. See *Rudder* v. *Koopmann*, 116 Ala. 332; *Kinney* v. *Koopmann*, 116 Ala. 310; *Rhodes* v. *Dunbar*, 57 Penn. St. 274, 290.

The plaintiff, however, contends that this question should have been submitted to the jury. This course would have been necessary, if material facts had been in dispute. But where upon all the evidence the court is able to see that the resulting injury was not probable, but remote, the plaintiff fails to make out his case, and the court should so rule the same as in cases where there is no sufficient proof of negligence. *McDonald* v. *Snelling*, 14 Allen, 290, 299. In *Hobbs* v. *London & Southwestern Railway*, L. R. 10 Q. B. 111, 122, Blackburn, J. said: "I do not think that the question of remoteness ought ever to be left to a jury; that would be in effect to say that there shall be no such rule as to damages being too remote." It is common practice to withdraw cases from the jury on the ground that the damages are too remote. *Hammond* v. *Bussey*, 20 Q. B. D. 79, 89. *Read* v. *Nichols*, 118 N. Y. 224. *Cuff* v. *Newark & New York Railroad*, 6 Vroom, 17. *Behling* v. *Southwest Penn. Pipe Lines*, 160 Penn. St. 359. *Goodlander Mill Co.* v. *Standard Oil Co.* 63 Fed. Rep. 400, 405, 406. *Pennsylvania Co.* v. *Whitlock*, 99 Ind. 16. *Carter* v. *Towne*, 103 Mass. 507. *Hoadley* v. *Northern Transportation Co.* 115 Mass. 304. *Hutchinson* v. *Boston Gas Light Co.* 122 Mass. 219. *Elmer* v. *Fessenden*, 151 Mass. 359.

The plaintiff further contends that the negligence of the defendant in keeping the oil upon the platform was concurrent with the careless act of Casserly, and that therefore it was a case where two wrongdoers acting at the same time contributed to the injurious result. But this is not a just view of the matter. The negligence of the defendant preceded that of Casserly, and was an existing fact when he intervened, just as in *Lane* v. *Atlantic Works*, 111 Mass. 136, the negligence of the defend-

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ants in leaving their loaded truck in the street preceded that of the boys who meddled with it.

The fact, if established, that the defendant's platform with the oil upon it constituted a public nuisance is immaterial, under the circumstances of the present case. If the plaintiff proved a nuisance, he need not go further and show that it was negligently maintained. But we have assumed the existence of negligence on the part of the defendant. Illegality on the part of a defendant does not of itself create a liability for remote consequences, and illegality on the part of a plaintiff does not of itself defeat his right to recover damages. The causal connection between the two still remains to be established. *Hanlon* v. *South Boston Horse Railroad*, 129 Mass. 310. *Hyde Park* v. *Gay*, 120 Mass. 589. *Hall* v. *Ripley*, 119 Mass. 135. *Damon* v. *Scituate*, 119 Mass. 66. *Kidder* v. *Dunstable*, 11 Gray, 342. *Hayes* v. *Michigan Central Railroad*, 111 U. S. 228, 241. In order to maintain a personal action to recover damages for a public nuisance, the plaintiff must show that his particular loss or damage was caused by the nuisance, just as in case of any other tort. *Wesson* v. *Washburn Iron Co.* 13 Allen, 95, 101, 103. *Stetson* v. *Faxon*, 19 Pick. 147, 154. And in considering the question of remoteness, it makes no difference what form of wrongdoing the action rests upon. *Sherman* v. *Fall River Iron Works*, 2 Allen, 524. *The Notting Hill*, 9 P. D. 105, 113. Mayne, Damages, 48, note.

Without considering other grounds urged by the defendant, a majority of the court is of opinion that, upon the evidence, the defendant was not bound, as a matter of legal duty, to anticipate and guard against an act like that of Casserly, he being a stranger coming upon the defendant's premises for his own purposes and in his own right. *Exceptions overruled.*

KNOWLTON, J. I agree to nearly all of the propositions of law in the opinion of the majority, but I do not agree that the case presents no question of fact for the consideration of a jury.

It seems to me that the principal question is whether there was evidence of negligence on the part of the defendant in reference to the risk of such an accident as happened. I think that there was such evidence. To say nothing of the particulars

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testified to, the fact that one is acting in violation of a criminal statute is always evidence of negligence. See Pub. Sts. c. 102, § 74. The opinion assumes that there was evidence of negligence on the part of the defendant in keeping so large a quantity of oil for so long a time in such a place. It seems to me that, if the defendant's conduct was negligent, it was in reference to the risk of just such an accident as happened. I do not know that any other kind of negligence is charged. It was to diminish the liability to such accidents that the statute was enacted. If there was negligence in violating the statute, it was because, from the storage of large quantities of kerosene oil for a long time in such an inflammable place, there was serious danger of a great and uncontrollable conflagration in connection with some accident which ought to have been contemplated, and which, in the absence of the oil, would be likely to cause little or no damage. I do not see what negligence on the part of the defendant could have been found from the evidence except its failure to anticipate and guard against such a danger. To constitute negligence creating a liability for the damages to the plaintiff, it is not necessary that the defendant should have contemplated the particular event which occurred. It is enough if it should have contemplated the probable happening of some accident of this kind, which involves danger to the property of others that ought to be guarded against.

I think the jury well might have found that the burning of the plaintiff's property was a direct result of the defendant's conduct in keeping this oil on the platform.

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CHARLES A. FOX *vs.* GEORGE E. ROGERS.

Suffolk. March 14, 1898. — July 2, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Contract — Illegality of Performance — Action.

Recovery under a contract to build a drain from the defendant's house to a private sewer in the street in front is not barred because the plaintiff performed it in an illegal way.

CONTRACT, upon an account annexed, for labor and materials furnished in laying a drain in Boston. Trial in the Superior Court, without a jury, before *Hopkins*, J., who found for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

F. Rogers, for the defendant.

F. C. Manchester, for the plaintiff.

HOLMES, J. This is an action of contract to recover for laying a drain from two houses of the defendant to a private sewer in the street in front, for the purpose of draining the surface water of the cellars, and for no other purpose. The judge, before whom the case was tried, found for the plaintiff, and it is conceded that the finding was warranted unless "the maintenance of the present action is contrary to the policy of the law." The principal matter relied on is that the pipes within and outside the building were Akron earthenware pipes, and not cast iron, as required for drain pipes by St. 1892, c. 419, § 125; (see also § 135; and Rev. Ord. Boston, 1892, c. 42, § 18;) and that even if, as the plaintiff understood and still contends, these provisions do not refer to pipes intended only for surface drainage, yet the plaintiff took up and relaid a part of a private drain outside with which his pipes connected, which was a drain for sewage, and was within the statute and ordinance. It also is argued, with less confidence, we take it, that the plaintiff's work, or part of it, was plumbing within the meaning of the ordinances, and required a permit under said c. 42, § 16, and also could not be done lawfully except by a registered plumber. Ibid., and see

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c. 17. And finally it is objected that whereas the plaintiff only had a permit to occupy a portion of the street, not exceeding twenty-five feet in length in front of the buildings, he did in fact open a different part of the street for fifty-eight feet, in breach of Rev. Ord. c. 43, § 57.

We shall not trouble ourselves about the construction of the statute and ordinances, because it does not follow that the plaintiff cannot recover if he broke them. There is no policy of the law against the plaintiff's recovery unless his contract was illegal, and a contract is not necessarily illegal because it is carried out in an illegal way. *Barry* v. *Capen*, 151 Mass. 99, 100. The judge was warranted in finding that the defendant employed the plaintiff to build a suitable drain, and left all details to the plaintiff's discretion, simply promising to pay for the job when finished in consideration of the plaintiff's promise to do it, — a contract lawful on both sides. It is true that the plaintiff declares on an account annexed, setting out every item of labor and materials, but no question was raised on the pleadings, and even taking the case according to the pleadings, many of the items would be good. If the contract was what we have supposed, it was good as a whole. The supposed illegal acts entered neither into the promise nor into the consideration. It was not necessary to prove them even for the purpose of showing that the drain was finished, and that the time for payment had arrived. Probably the plaintiff's acting in excess of his license would be immaterial after the work was done. It may be that if the pipes are not of the material required by law, they are liable to be taken up, or that in some way the fact might affect the amount of the plaintiff's recovery, if that question were before us. But the only question is the fundamental one, whether we can say, as matter of law, that the contract was illegal, and that the plaintiff can recover nothing. That, in the opinion of a majority of the court, we cannot say. It is perfectly plain that the parties did not intend to contract for anything illegal, and even if the contract had contemplated the specific items charged for, it may be that it could have been sustained, but on that we express no opinion. *Favor* v. *Philbrick*, 7 N. H. 326, 337 *et seq.* *Waugh* v. *Morris*, L. R. 8 Q. B. 202.

Exceptions overruled.

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ALEXANDER DAVIS *vs.* WILLIAM H. FORBES.

Suffolk. March 9, 10, 1898. — July 14, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Personal Injuries — Assumption of Risk — Action — Master and Servant.

A boy, who had had two years' experience in riding colts which were being trained, was injured by the breaking of a stirrup strap on the saddle which he was using when so employed. In an action against his employer for his injury, he testified that, when he went to work, A., the defendant's foreman, handed him a saddle on which the stirrup strap was too short; that he called A.'s attention to this, and A. said, "Here is a pair of old stirrup straps hanging in the case that you will have to use," taking them down and handing one to the plaintiff, who noticed a bad place in it, and told A. that it did not look right; that A. took it out of his hand, got hold of it and pulled it; that he then put it on the floor and pulled it up, and said it was strong enough to hold him, and that it had got to hold the plaintiff until he got a new one; that the plaintiff believed the strap was strong enough after A. tested it and told him it was strong enough; and that he used it several days, when it broke at the point to which A.'s attention had been called. *Held*, that the plaintiff assumed the risk of using the strap in the condition in which it was; and that the action could not be maintained. KNOWLTON, J. dissenting.

An employer is under no legal obligation to furnish his injured employee with medical attendance.

TORT, for personal injuries occasioned to the plaintiff, while in the employ of the defendant, by the breaking of a strap on a saddle furnished to the plaintiff for use in the course of his employment. The declaration contained two counts, the first charging negligence in furnishing an unsafe and defective saddle for the plaintiff's use, and the second charging neglect to provide medical attendance for the plaintiff. Trial in the Superior Court, before *Gaskill*, J., who allowed a bill of exceptions, in substance as follows.

The judge ruled that the plaintiff could not recover under the second count of the declaration; and the plaintiff excepted.

The defendant is the owner of an estate at Readville of about eight hundred acres; and one Choate is manager of this estate, and has in his charge about one hundred running horses of blooded stock, and has general charge and supervision of the

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raising and training of colts on three separate farms, each farm having a foreman who is responsible to Choate.

On cross-examination, Choate testified that the exclusive charge of the farm where the accident happened, containing about three hundred acres, was delegated to one Abbott; that he had charge of the running race track or course, and of the string of running horses, which, at the time of the accident, consisted of ten horses, and he also had charge and general supervision of fifty brood mares; that he gave the orders to the employees on that farm, and had charge of all the tackle and equipment which was at that stable; that it was the duty of Abbott, if it was the duty of anybody, to furnish a saddle complete for the boys to ride in training and breaking running horses; and that Abbott had the furnishing of everything there to the boys.

There was evidence that in the fall of 1892 and 1893 the plaintiff, who had done no riding of horses before, was employed as an exercise boy or rider by Choate at the farm where the accident happened; that at that time he was hired to ride colts which had been partially broken, and he worked for about six months and was a fair rider; that he was accustomed to notify Abbott if anything was wrong; that after leaving the Forbes farm at the end of that employment he had been employed riding and breaking colts continuously in Baltimore and New York until the time of his re-employment by Abbott, as hereinafter stated; that in all he had been riding and breaking colts for over two years before the happening of the accident; that on September 29, 1895, the plaintiff went to the Forbes farm and applied to Abbott for employment; that Abbott told him that he would see if Choate would hire him; that Choate did so and told him to come to work the next morning; and that the next morning he went into the office to get from Abbott the riding saddle and tackle.

The plaintiff testified that Abbott gave a saddle to the plaintiff, on which the stirrup leather was too short; that he called the attention of Abbott to this, and Abbott said, "Here is a pair of old stirrup straps hanging in the case that you will have to use," taking them down; that he handed the plaintiff one and took one himself, and was putting the stirrup leather on the

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iron; that the plaintiff noticed a bad place in the one handed to him; that he told Abbott that that did not look right; that Abbott took it out of his hand, got hold of it and pulled it; that he then put it on the floor and pulled it up, and said it was strong enough to hold him, and that it had got to hold the plaintiff until he got a new one; that the plaintiff believed the straps were strong enough after Abbott tested them, and told him they were strong enough; that the plaintiff thereupon put the saddle on the colt, which he was directed to ride by Abbott; that during the next three days he used the saddle in riding, in accordance with instructions, without accident, with the buckle in the same hole that it was in at the time of the accident; that on the fourth day of his employment, he and the other boys who were riding that day were directed by Abbott to breeze the colts; that this meant to run them at the highest rate of speed; that on the second time around the race course, while he was riding at a rate of speed of an eighth of a mile in about twelve seconds, the stirrup leather above referred to broke, and the plaintiff was thrown under the horse, which kept on going, dragging him for a considerable distance, and causing the injuries complained of; and that the point where the stirrup strap broke was the point to which the plaintiff called the attention of Abbott previously.

Abbott, called as a witness by the defendant, testified that he had been employed by him for five years; that he was foreman of the farm at Readville where the business of breaking colts was conducted; that he knew the plaintiff about four years previously, and was there when he was first in the defendant's employ; that when the plaintiff left there the first time, he was experienced; that the witness was there when the plaintiff returned in September, 1895, and was present at the time of the accident, and saw what happened; that he went to the saddle case and took some stirrup straps off of the pin and held them out to the plaintiff; that the plaintiff took up the stirrup strap which broke, and said, "I will take this strap"; that Abbott looked at the strap and showed him this spot on it; that the plaintiff also said, "That is all right, I will take that strap, it will hold me"; that the plaintiff took the strap and put it on his saddle, and went out riding, and the strap broke; that the plaintiff also said, "I will take this strap, I will risk that it will

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hold me"; that at the time of the accident he was pretty close to the plaintiff; that the plaintiff's horse was running up the stretch and swerved to the right, and the plaintiff hit him over the head with a stick two different times, and it knocked the horse back and threw him on to the stirrup that broke, and he fell about the end of the stretch; that he had told the plaintiff not to use the whip under any circumstances; that at that time there were several straps, he should think ten or a dozen; that some of them were good and some of them were bad; that there were two new straps there, and others that were in good condition; that he told the boys to look after the straps, and if there was anything the matter with them to let him know it; that on the morning of the accident he did not know who put on the strap, but he himself did not, but gave the strap to the plaintiff; and that the witness did not regulate their length.

On cross-examination, he testified that he considered that a safe strap to use that morning; that he would not have any hesitation in giving it to the boy to ride, if he showed him the spot in the strap; that it was not necessary for him to use it in that hole; that he did not tell the boys that morning to take all the speed there was out of the horses, but told them to work them as fast as they would go themselves without urging them at all; and that he had full charge of furnishing the tackle that was there to the boys, and he considered he should use safe tackle.

There was a conflict of evidence as to whether or not there were other saddle straps which might have been used, the plaintiff alone testifying that there were no other saddle straps there which were not in use; and as to whether or not the plaintiff could ride with safety by strapping the saddle strap to the clasp in another hole than that at the defective spot at which the strap broke, the plaintiff testifying that it would not have been as safe for him to buckle the strap in any other hole.

On cross-examination, the plaintiff testified as follows:

"*Q.* You could perfectly well have put the tongue in the next hole, could n't you? *A.* No, sir; it was n't my length. — *Q.* Well, you could have done it, could n't you? *A.* No, sir; it is n't safe. — *Q.* You put it right into the hole that was defective and rode it that way? *A.* It was a great deal safer in the defective hole than the other one. — *Q.* You strapped it yourself, did n't you?

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A. No, sir; Mr. Abbott. — *Q.* But you used it in the hole that was defective, did n't you? *A.* Mr. Abbott put it into the hole."

The judge ruled that, upon all the evidence, the action could not be maintained, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

P. J. Doherty, (*E. W. Hamlen* with him,) for the plaintiff.

J. Lowell, (*R. E. Forbes* with him,) for the defendant.

MORTON, J. It is difficult to understand why it was a great deal safer, as the plaintiff testified that it was, to put the buckle in the hole where the strap broke than it was to put it in the hole next to it. But, assuming that it was as the plaintiff said, we think that the plaintiff took the risk of using the strap as he did in the condition in which it was. It does not appear what his age was, except that he was a minor. But he had been riding colts for two years before the accident, and, though a boy, it is fair to assume that he had become experienced in matters pertaining to saddles and riding tackle. According to his testimony, he noticed a bad place in the strap, and told Abbott that it did not look right. Then, as he testified, "Abbott took it out of his hand, got hold of it and pulled it; that he then put it on the floor and pulled it up, and said it was strong enough to hold him, and that it had got to hold the plaintiff until he got a new one." The plaintiff further testified "that he believed the straps were strong enough after Abbott tested them, and told him they were strong enough." There seems to have been what amounted to a common examination of the straps by the plaintiff and Abbott, and though the plaintiff relied to some extent, as was natural, on Abbott's judgment, he appears to have been satisfied himself from the test that was made in his presence that the strap was suitable for use, as he proposed to use it in the condition in which it was. No complaint was made that the test was not a reasonable one, and not such as the plaintiff's practical experience commended. There is nothing to show that Abbott's declaration "that it had got to hold the plaintiff until he got a new one," and "here is a pair of old stirrup straps hanging in the case that you will have to use," coerced the plaintiff into using a strap which he did not think fit, or led him to assume a risk which he would not otherwise have taken. On

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the contrary, he testified, as already observed, "that he believed the straps were strong enough after Abbott tested them, and told him they were strong enough," and evidently used them relying on what his own senses had told him concerning the test to which they were subjected, corroborated as it was by Abbott's statement that they were strong enough. See *Williams* v. *Churchill*, 137 Mass. 243. The fact that the strap afterwards broke under a strain to which it was subjected has of course no tendency to show that the plaintiff was coerced into using it, or did not assume the risk.

The defendant was under no legal obligation to furnish the plaintiff with medical attendance, even if he had been liable for the injury, and the ruling that the plaintiff could not recover under the second count was therefore correct. The case of a seaman injured on shipboard is different.

In the view which we have taken of the case it is unnecessary to consider whether there was any evidence of negligence on the part of the defendant. *Exceptions overruled.*

KNOWLTON, J. Because I consider the decision in this case wrong, as an invasion of the province of the jury, and because the opinion seems to me misleading in regard to the principles applicable to cases of this kind, I feel constrained to express my dissent.

The fundamental questions upon which the rights of the parties depend in actions for negligence are whether the defendant was negligent, and whether the plaintiff was in the exercise of due care. In my opinion, the question whether the plaintiff assumed the risk is only important as it bears upon one of these two questions. It does not affect the fundamental propositions on which the law of negligence rests. In its nature it is rather a collateral inquiry, the answer to which often easily decides the case in accordance with these fundamental propositions, without the necessity of considering either of them by itself. I do not remember ever having read or heard any exposition or argument to show that the doctrine of the assumption of the risk by a plaintiff has changed the rule of law, that one who is himself without fault and in the exercise of due care, and who suffers from the negligence of another, may recover the amount of his

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damages. The maxim, *Volenti non fit injuria*, is applicable to actions for negligence, as it is to other cases. The doctrine of the assumption of the risk is merely a formal statement of this maxim in its application to concrete cases.

If a plaintiff voluntarily assumes a risk, and afterwards sues for an injury that he has suffered which was within the risk, he cannot recover, because he encounters one or the other of two facts, either of which is fatal to his claim. In such a case it would appear in the last analysis, if the truth were ascertained, either that the plaintiff was negligent, or that the defendant was not negligent.

In every case where the evidence warrants it a defendant has a right to have this test applied. Sometimes each of the fundamental questions in the law of negligence would be difficult to answer upon the evidence, were it not easy to determine that the plaintiff voluntarily assumed the risk. In such a case the defendant prevails without a separate decision of either of the two questions, whether he was negligent, or whether the plaintiff was in the exercise of due care. Such a result, considered in reference to the law of negligence, is a decision that the plaintiff has failed to establish one or the other of the two propositions which must be established in every suit for negligence before there can be a recovery.

The cases to which these principles are applied may be divided into two classes. The first is where the plaintiff, for a valuable consideration, voluntarily assumes the risk by virtue of a contract which expressly or impliedly includes the assumption of it. In ordinary cases, when one contracts to enter a business as employee, he voluntarily agrees, for the wages to be paid him, to assume all the open and obvious risks of the business, including the "manifest dangers attendant upon the use of the ways, works, and machinery of a permanent character that are plainly intended to be retained as a part of the plant to which the contract for service relates." *Murch* v. *Wilson*, 168 Mass. 408.

This may be called a contractual assumption of risk. In regard to the dangers covered by it the employer owes the employee no duty, and he cannot be held guilty of negligence. The rights of the parties depend, not necessarily upon that

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which the employee in fact understands and appreciates, but upon that which he ought to understand and appreciate in making such a contract for service, and upon that which the employer has a right to suppose that he understands and appreciates. *Ladd* v. *New Bedford Railroad*, 119 Mass. 412. *Lovejoy* v. *Boston & Lowell Railroad*, 125 Mass. 79. *Coombs* v. *Fitchburg Railroad*, 156 Mass. 200. *O'Maley* v. *South Boston Gas Light Co.* 158 Mass. 135. *Fisk* v. *Fitchburg Railroad*, 158 Mass. 238. *Goodridge* v. *Washington Mills*, 160 Mass. 234. *Rooney* v. *Sewall & Day Cordage Co.* 161 Mass. 153. *Feely* v. *Pearson Cordage Co.* 161 Mass. 426. *Goodes* v. *Boston & Albany Railroad*, 162 Mass. 287. *Austin* v. *Boston & Maine Railroad*, 164 Mass. 282. *Content* v. *New York, New Haven, & Hartford Railroad*, 165 Mass. 267. *Murch* v. *Wilson*, 168 Mass. 408. *Sweeney* v. *Berlin & Jones Envelope Co.* 101 N. Y. 520. *Appel* v. *Buffalo, New York, & Philadelphia Railway*, 111 N. Y. 550. *Hayden* v. *Smithville Manuf. Co.* 29 Conn. 548. *Tuttle* v. *Detroit, Grand Haven, & Milwaukee Railway*, 122 U. S. 189.

The second class of cases is where an employee has suffered from the negligent conduct of an employer in reference to some matter not included in his assumption of risks by virtue of the contract under which he is working at the time of the injury. As to these cases different considerations apply. The employer is under an implied contract or duty to provide safe and proper machinery, tools, and appliances for the employee. There is often evidence on which it is contended that he is guilty of negligence in this particular. In dealing with such a case, upon the question whether the plaintiff is precluded from recovery on the ground that he assumed the risk, it must be assumed that the jury properly might find the defendant guilty of negligence. The question is to be determined in reference to the possibilities of a finding either way on that point. If, looking to the conduct of the defendant alone, the finding ought to be against him, on what ground can the plaintiff be cut off from his right to damages? Under the law of negligence it is only on the ground that he is himself in fault through failure to exercise proper care, or otherwise. If the facts relied on to establish this defence are merely that he continued to work, knowing of the defect which afterwards caused his injury, and if the defect is so slight,

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viewed in reference to the defendant's duty to provide for his safety, that it is just a little outside of the line which separates due care on the part of the defendant from negligence, the question arises whether there was such a voluntary assumption of the risk on the plaintiff's part as to put him in the same category with the defendant in reference to the alleged negligence. It is the law of Massachusetts that, if he knew and fully appreciated the risk, and continued to work without any special exigency constraining him so to do, his exposure to the risk must be deemed to have been voluntary, and if the condition of the defective part was such that to provide it, or keep it for his use, constituted negligence on the part of the defendant who was under an obligation to have it safe, his continued use of it, knowing and appreciating the danger from it, equally constituted negligence which prevents him from recovery. This rule bears rather hard upon employees, for, *ex hypothesi*, the employer is primarily in the wrong, and practically the employee has no alternative but to abandon his contract and quit the service, even though that might mean starvation for his family. His remedy by a suit upon his contract would be costly and uncertain, and the damages recoverable would be small. In England, and in some of the American States, continuing to work under such circumstances is not deemed, as matter of law, a voluntary assumption of the risk. *Smith* v. *Baker*, [1891] A. C. 325. *Yarmouth* v. *France*, 19 Q. B. D. 647. *Thrussell* v. *Handyside*, 20 Q. B. D. 359. But the rule is established in Massachusetts, and I do not desire to depart from it.

It must be remembered that the rule is applicable only when the plaintiff understands and appreciates the risk. Nothing less than his full understanding and appreciation of it can make his exposure to the danger voluntary, and charge him with negligence whenever the employer is negligent. It is only when his knowledge of the danger is such as to make his conduct as culpable as that of the employer that he can be precluded from recovery on this ground. The question oftenest arises when it is difficult to tell whether there was sufficient danger properly to charge with negligence the employer whose duty it was to know that his appliances were safe, and if the conditions are such that the conduct of the employer in procuring the defective appliance

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falls only a hair's breadth below the line of due care, nothing less than a full understanding of the danger can charge the employee with negligence in using it when it was provided for him.

It will hardly be contended that a hired servant always works at his own risk when he continues in service after discovering that his employer's negligence in failing to repair machinery, or in introducing unsafe machinery, has somewhat increased the perils of his situation. So to hold would altogether deprive the employee of the benefit of the salutary provision of law which makes it the duty of the employer to provide proper tools and machinery with a view to his safety. It is often consistent with due care for him to continue in the service when he knows that the provision for his safety is not as good as it should be. He may think that the danger is not great enough reasonably to require him to refuse to work. That full knowledge and appreciation of the risk on the part of the plaintiff are essential to the maintenance of this defence in cases of this kind has repeatedly been held, and I am not aware that any different doctrine has been enunciated. *Thomas* v. *Western Union Telegraph Co.* 100 Mass. 156. *Mahoney* v. *Metropolitan Railroad*, 104 Mass. 73. *Linnehan* v. *Sampson*, 126 Mass. 506. *Lawless* v. *Connecticut River Railroad*, 136 Mass. 1. *Ferren* v. *Old Colony Railroad*, 143 Mass. 197. *Fitzgerald* v. *Connecticut River Paper Co.* 155 Mass. 155. *Mahoney* v. *Dore*, 155 Mass. 513. *Tenanty* v. *Boston Manuf. Co.* 170 Mass. 323.

That the danger is obvious is not necessarily enough to defeat the plaintiff on this ground, although it may warrant a finding by a jury against him. The danger may be so great and so obvious that, in any possible view of the evidence, the general judgment of common men would at once condemn his conduct in continuing to work as careless. In such a case it would be the duty of the court to order a verdict against him on the ground of a want of due care; but it would not necessarily follow that he voluntarily assumed the risk, so as to come within the doctrine, *Volenti non fit injuria*. He might have been stupid, or inattentive, and merely careless in not ascertaining the nature and extent of the danger.

To decide against a plaintiff on this ground involves an affirmative finding of fact. The negligence which is fatal to

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his case is not merely an omission to take proper precautions. It is positive negligent action. It is a voluntary exposure to a well understood danger so great that due care requires him to avoid it. The defendant must establish the plaintiff's knowledge and appreciation of the risk and voluntary assumption of it, if he would prevail when on other grounds the plaintiff's case might be decided in his favor. When a fact is to be established by evidence, a court can seldom say, as matter of law, that it is proved. Where the plaintiff has the burden of proof to show the defendant's negligence or his own due care, the case is different. There the court must determine, as matter of law, in the first instance, whether any evidence has been introduced in support of the propositions. As was said in *Osborne* v. *London & Northwestern Railway*, 21 Q. B. D. 220, of the discussions in *Yarmouth* v. *France*, 19 Q. B. D. 647, and in *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, "Those observations go far to make it hard for a defendant to succeed on such a defence as that relied on here, for it is probable that juries would often find for plaintiffs on the ground that they had not full knowledge of the nature and extent of the risk, but that cannot be helped."

In cases of contractual assumption of the risk, it is often claimed that the plaintiff has introduced no evidence of any danger which was not obvious, and so included in his implied contract, whether he actually understood it or not. But in regard to risks not assumed by the plaintiff in his contract for service resulting from conduct of the defendant while the plaintiff is working under his contract, I think it can seldom be said, as matter of law, that the employee has lost his legal right to hold his employer for the consequences of his negligence on the ground of voluntary assumption of the risk by continuing to work, unless his own conduct is such that, viewed independently, it furnishes no evidence of his due care.

In the present case it cannot be contended that there was a contractual assumption by the plaintiff of the risk of injury from the use of an unsafe and improper stirrup strap. No such risk was obvious when he entered the defendant's service. On the contrary, the defendant, by his contract, impliedly agreed to furnish safe and proper straps. There was no new contract nor any new consideration for a contract when the plaintiff obeyed

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the order of Abbott to use the strap which broke. The rights and obligations of both parties created by the contract of hiring remained unchanged. It may be that a jury would have found that the plaintiff was careless in consenting to use the strap; but certainly the court cannot say so as matter of law, and the opinion does not put the decision on that ground. The ground of the decision is that the plaintiff assumed the risk. The opinion implies that it may be doubtful whether the defendant was negligent, although there can be no doubt of his duty to furnish safe and proper straps. If the jury found that the defendant was primarily responsible for the injury, as the opinion assumes that they might find, the plaintiff is cut off from recovery by a holding of the court, as matter of law, that his relation to the risk by reason of his consenting to use the strap under orders was such as necessarily to make him guilty of negligence. This seems to me to leave out of consideration the facts that the defendant was under a legal obligation to know that the strap was safe, while the plaintiff was under no such obligation, and that the plaintiff might rely to some extent upon the probable performance of duty by his employer and upon the implied representation of his employer, as well as the express representations of Abbott the foreman, that the strap was sufficiently strong. I think that there was evidence for the jury on this point, but that the court could not properly say, as matter of law, that the proposition was established. Dealing with it as a matter of fact, I think the weight of the evidence was that he did not fully understand and appreciate the risk. He was undoubtedly influenced by the statements and representations of Abbott. He knew the strap was defective, but he did not know how strong it was. No one can accurately estimate the strength of a piece of old leather from the appearance of it. He saw Abbott pull upon it, but he did not know how much force was applied in pulling. Probably he thought it was stronger than it proved to be. If the strap was only just bad enough to make the defendant liable for negligence in furnishing it, I do not think it follows, as matter of law, that the plaintiff was negligent in not refusing to use it. I think the questions at issue were questions of fact for the consideration of the jury, under proper instructions. Except in cases of contractual as-

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sumption of the risk, I think there is great danger of improper interference with the right of plaintiffs to a trial by jury upon questions of fact, in holding as matter of law, even when the defendant might be found to be negligent, and even when it does not appear on other grounds that the plaintiff has failed to show his own due care, that the plaintiff has lost his right to recover by a voluntary assumption of the risk.

I hope that this fashionable modern doctrine will not lead to a departure from the sound principles on which the law of negligence rests.

MARTILLA WHIPPEN *vs.* CHARLES D. WHIPPEN.

Suffolk. January 13, 1898. — August 30, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Marriage — Divorce — Statute.

Section 10 of c. 145 of the Public Statutes, which declares that, when persons resident in this Commonwealth, in order to evade the provisions of certain statutes as to prohibited marriages, and with an intention of returning to reside in this Commonwealth, go into another State or country, and there have their marriage solemnized, and afterwards return and reside here, the marriage shall be deemed void in this Commonwealth, requires that both parties should have the intention to evade the provisions of the statute.

LIBEL, for a sentence of nullity of marriage. Hearing in the Superior Court, before *Lilley*, J., who ruled that the libellant was entitled to a decree, and, at the request of the libellee, reported the case for the determination of this court. If the ruling was correct, a decree of nullity was to be entered; otherwise, the libel was to be dismissed. The facts appear in the opinion.

J. F. Wakefield, for the libellee, submitted the case on a brief.

S. W. Forrest, for the libellant.

FIELD, C. J. This case must be governed by *Tyler* v. *Tyler*, 170 Mass. 150, unless the fact that the libellant was innocent of any intention to evade the provisions of our statutes distinguishes this case from that. The libellee intended to evade the provisions of Pub. Sts. c. 145, § 4, and c. 146, § 22. There is

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no doubt that the present libel is the proper proceeding for determining the validity in this Commonwealth of the marriage of the parties in Rhode Island. Pub. Sts. c. 145, § 11.

The divorce granted to the former wife of the libellee for his adultery became absolute on July 9, 1894. On the following day the parties to this libel, both inhabitants of this Commonwealth, went to Rhode Island and were married. They returned the same day, and continued to live here as husband and wife. The disability of the libellee to marry again, under Pub. Sts. c. 146, § 22, continued until July 10, 1896. Before that time, to wit, on February 29, 1896, the libellant "ceased to live with the libellee, because she then believed that she was not legally married."

This case is not within St. 1895, c. 427, as amended by St. 1896, c. 499, and the decision of it depends upon the construction to be given to Pub. Sts. c. 145, § 10, which provides that, "when persons resident in this Commonwealth, in order to evade any of the provisions of the first five sections of this chapter, and with an intention of returning to reside in this Commonwealth, go into another State or country and there have their marriage solemnized, and afterwards return and reside here, the marriage shall be deemed void in this Commonwealth." That section is derived from Gen. Sts. c. 106, § 6, — see c. 107, § 25, — and it was first enacted in Rev. Sts. c. 75, §§ 4 and 6, probably in consequence of the decision in *Putnam* v. *Putnam*, 8 Pick. 433. When first enacted it read, "When any persons resident in this Commonwealth," etc.

Section 4 of the Pub. Sts. c. 145, is confined to marriages solemnized in this Commonwealth. *Commonwealth* v. *Lane*, 113 Mass. 458, 461. If in the present case the marriage had been solemnized in this Commonwealth, it would, we think, have been void, even although the libellant at the time of the marriage was ignorant of the disability imposed upon the libellee by Pub. Sts. c. 146, § 22, and entered into the marriage in good faith. *Pratt* v. *Pratt*, 157 Mass. 503. *Googins* v. *Googins*, 152 Mass. 533. *Thompson* v. *Thompson*, 114 Mass. 566. The language of Pub. Sts. c. 145, § 4, is, "All marriages contracted while either of the parties has a former wife or husband living, except as is provided in chapter one hundred and forty-six, shall

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be void." We have no doubt that the Legislature might have made the same or a similar provision concerning marriages solemnized without the Commonwealth of persons resident within the Commonwealth, if the parties afterwards returned to and continued to reside within the Commonwealth. As was said in *Commonwealth* v. *Lane*, *ubi supra*, "What marriages between our own citizens shall be recognized as valid in this Commonwealth is a subject within the power of the Legislature to regulate."

The question then is whether Pub. Sts. c. 145, § 10, mean that both persons must intend to evade some of the provisions of the first five sections of the chapter, or is it enough that one of them so intends? It may seem unreasonable that the libellant should be denied the relief she seeks, because in contracting the marriage she was innocent of any intention to evade our statutes, when, if she had been guilty of such an intention, the relief would be granted. But the remedy of having a marriage declared invalid is not given primarily for the benefit of either party to the alleged marriage, but for the purpose of determining the status of the parties, and of enforcing the policy of the Commonwealth with regard to marriage and divorce. In the present case, if the parties desired to be lawfully married to each other, they could have been married in this Commonwealth or elsewhere at any time after the expiration of two years from the divorce granted to the former wife of the present libellee, and they can now be married. It is said that the present libellee is the same person as the libellant in *Whippen* v. *Whippen*, 147 Mass. 294, and the present libellant undoubtedly wishes to obtain by the present proceedings a decree of nullity of marriage which would have much the same effect as a decree of divorce. But in the great majority of instances it would probably be for the interest of the innocent party to have such a marriage as that shown in the present case declared valid. Our statutes under certain circumstances declare that a marriage shall not be deemed or adjudged void when consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage, when without such belief the marriage would be adjudged void. Pub. Sts. c. 145, § 27. St. 1895, c. 427. St. 1896, c. 499.

The most natural construction of Pub. Sts. c. 145, § 10, is that

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both persons must have the intent to evade the provisions of the chapter, although the language is far from clear. Considering that the general rule of law is that a marriage valid where it is celebrated is valid everywhere, and that this marriage undoubtedly is valid in Rhode Island, and that Pub. Sts. c. 145, § 10, attempt to establish an exception to this rule, and that the word "persons" and not "person" is used in it, we think it more reasonable to hold that to make the marriage void in this Commonwealth both persons must be residents of the Commonwealth, and both must intend to evade the provisions of the chapter by going into another State or country and having their marriage solemnized there, with the intention of returning to reside in the Commonwealth, and both must afterwards return and reside in the Commonwealth.

The libel must be dismissed. *So ordered.*

ISABELLA BISHOP *vs.* FRANK P. DONNELL.

171 563
182 135

Suffolk. January 14, 1898. — August 30, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Writ of Error — Validity of Service of Writ and of Judgment.

Where the defendant in the original action was not misled by the mistake in the date of the original summons, which was duly served, and he had full opportunity to appear and defend the action, and where no error appears in the record itself and the defect was one which might have been amended if the attention of the court had been called to it, but the defendant lay by and made no defence, although he was aware of the pendency of the action, he cannot be heard by writ of error, and he ought not to be heard in any form of proceeding to contest the validity of the service and judgment.

WRIT OF ERROR, to reverse a judgment of the police court of Chelsea, rendered in an action of contract brought by the defendant in error against the plaintiff in error. Plea, *in nullo est erratum.* At the hearing in this court, before *Knowlton*, J., it appeared that, on November 7, 1896, the summons in the original action was delivered to the plaintiff in error by an officer, who

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testified that he then told her when she was to appear at court, and that she told him what the suit was for. The plaintiff in error admitted that, at about ten o'clock on November 14, 1896, she, with her husband and her attorney, was on the stairway of the building in which the police court of Chelsea is regularly held, which stairway leads to the hall adjacent to the police court room, and that she was then told by the attorney that the writ in the original action against her was returnable before the police court on that day and at about that hour, and that the date intended to be inserted in the summons served upon her was October 29, 1890, instead of October 29, 1896. It also appeared that the attorney went into court and examined the writ, and came away without informing the court or the attorney of the plaintiff in the original action of the mistake in the date of the summons. The return of the officer was in the usual form, setting forth due service of a summons upon the defendant.

The justice found as a fact that the plaintiff in error knew of the mistake in the date of the summons before the time for appearance, and that she purposely refrained from appearing in answer to the suit on account of the mistake.

The counsel for the plaintiff in error contended as follows:

"1. That the plaintiff in error had not been served with original process in contemplation of law. 2. That she had in no degree waived her right thereto by appearance or otherwise. 3. That, as matter of law, neither the said so called summons, which was lacking in not containing precise and correct notice of the time of the holding of the court at which she was called upon to appear, nor the information obtained as aforesaid in contradiction of that contained in the so called summons, made her responsible to the police court of Chelsea; that there was absence of notice to her to attend, such as she was bound in law to respect; and that she was entitled to have the judgment reversed."

Inasmuch as the record showed due service, and no error was apparent of record, the justice was of opinion that the plaintiff in error had a remedy against the officer who served the writ in an action at law for making a false return, to recover the damages caused thereby, if any, and that she was not entitled to a remedy in this form of proceeding, and refused to rule as requested; and the plaintiff in error alleged exceptions.

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G. A. Emerson, for the plaintiff in error.

W. J. Williams, for the defendant in error, submitted the case on a brief.

FIELD, C. J. The tendency of modern decisions is to the effect that a domestic judgment may be reviewed or reversed by a proper proceeding between the parties when there has been in fact no legal service of process and no appearance in the cause, even although the proof of such facts tends to contradict the record. The remedy by a suit against the officer for a false return often is inadequate, particularly when a large judgment has been rendered against a defendant without any service upon him, and without his knowledge. The return by an officer of service of process usually is held conclusive in collateral proceedings, but as the facts stated in the return are not facts within the knowledge of the court, it is generally held that the record in this respect may be impeached by the party directly aggrieved by it if it is false. In the case of a suit on a foreign judgment, the judgment may be impeached by pleading and proving in defence to the suit that the foreign court in fact acquired no jurisdiction over the defendant, although the record of the case recites due service on him or an appearance by his attorney, and this is true in a suit on a domestic judgment where the defendant was not resident within the Commonwealth when the suit was brought in which the judgment was rendered. The proper proceeding in this Commonwealth for reviewing or reversing a domestic judgment, when the defendant was not resident within the Commonwealth when the suit was brought in which the judgment was rendered, is a writ of error, although such a defendant may also have a writ of review, which is not a writ known to the common law. If the defendant was resident within the Commonwealth when the suit was brought, the proper proceeding is a writ of review, or a petition for a writ of review, and there are dicta to the effect that he may also bring a writ of error. *Kimball* v. *Sweet*, 168 Mass. 105. *Hall* v. *Staples*, 166 Mass. 399. *American Tube & Iron Co.* v. *Crafts*, 156 Mass. 257. *Young* v. *Watson*, 155 Mass. 77. *Rand* v. *Hanson*, 154 Mass. 87. *Needham* v. *Thayer*, 147 Mass. 536. *Fall River* v. *Riley*, 140 Mass. 488. *Hendrick* v. *Whittemore*, 105 Mass. 23. *James* v. *Townsend*, 104 Mass. 367. *Hutch-*

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inson v. *Gurley*, 8 Allen, 23. *Bodurtha* v. *Goodrich*, 3 Gray, 508. *Brewer* v. *Holmes*, 1 Met. 288. *Smith* v. *Rice*, 11 Mass. 507, 512. See *Harrison* v. *Hart*, 21 Ill. App. 348; *Nietert* v. *Trentman*, 104 Ind. 390; *Michels* v. *Stork*, 52 Mich. 260; *Bolles* v. *Bowen*, 45 N. H. 124; *Nelson* v. *Swett*, 4 N. H. 256; *Ketchum* v. *White*, 72 Iowa, 193; 22 Am. & Eng. Encyc. of Law, 194 *et seq.*

If it be assumed, without deciding it, that in the present proceedings it was open to the plaintiff in error to show that no summons, or no sufficient summons, was served upon her, we are of opinion that the mistake in the date of the summons, on the facts found by the presiding justice, is not a sufficient reason for avoiding the judgment. If the officer had been permitted to amend his return in the original action so as to show the date of the summons, and the defendant therein had moved to dismiss the action, the court might have ordered the service of a new summons, as the defendant was within the jurisdiction of the court. If the suit had been in the Superior Court, the decision of that court upon such a motion would have been final. *Parker* v. *Kenyon*, 112 Mass. 264. The defect in the service of process was one which the defendant in the original action might have waived.

Pub. Sts. c. 187, § 3, is as follows: "A judgment in a civil action shall not be arrested or reversed for a defect or imperfection in matter of form which might by law have been amended; nor by reason of a mistake respecting the venue of the action; nor because the judgment is not in conformity with the allegations of the parties, if it is in conformity with the verdict; nor shall any error in law in a civil action in which the defendant appeared and a verdict was rendered, except such as occurs after verdict, be assigned in a writ of error. But nothing herein contained shall prevent either party from assigning an error affecting the jurisdiction of the court." In *Brown* v. *Webber*, 6 Cush. 560, 564, the court say: "A court, in order to render a valid judgment, must have jurisdiction of the subject matter, and of the persons of the parties. In the language of the statute, (Rev. Sts. c. 100, § 21,) it must be a suit where the person and case may be rightly understood by the court. In order to acquire jurisdiction of the person, he must be served with process, as required by

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law, by arrest, attachment, and summons, or original summons, or otherwise. If the defendant would object to the irregularity, or want of due service, in this respect, he may do so by plea in abatement, where it is necessary to plead any matter of fact, on which his objection is founded, or by motion to dismiss, where the objection is apparent on the face of the proceedings, or the return of the officer; and in either case, before pleading generally to the merits. And to enable him to do this, he may appear specially for the purpose of stating such objection, without thereby waiving it. But if he will enter a general appearance, or plead to the merits, or lie by after he is aware of the matter of objection to the jurisdiction, he thereby submits himself to the jurisdiction of the court; and the court, then, having jurisdiction of the subject, and jurisdiction of the persons of the parties, may proceed, and the exception that the suit is brought in the wrong county cannot be made in arrest of judgment. *Gleason* v. *Dodd*, 4 Met. 333, 339."

If this were a petition for a writ of review, we think that on the facts appearing in evidence it would not be granted. The defendant in the original action was not misled by the mistake in the date of the original summons, and she had full opportunity to appear and defend the action. No error appears in the record itself, and the defect was one which might have been amended if the attention of the court had been called to it. She lay by and made no defence, although she was aware of the mistake in the date of the summons and of the pendency of the action, and she ought not now to be heard in any form of proceeding to contest the validity of the service and judgment. See *Arnold* v. *Maltby*, 4 Denio, 498; *Morrison* v. *Underwood*, 5 Cush. 52. The ruling of law of the presiding justice, if it be assumed to be erroneous, did her no harm; it did not affect his findings of fact, and we are of opinion that on those findings she is not entitled to have the judgment reversed. It is unnecessary to decide whether the errors of fact were well assigned, or whether the plaintiff's sole remedy was by a petition for a writ of review. St. 1895, c. 234, § 9.

Exceptions overruled, and judgment affirmed.

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ELIZABETH KENDALL *vs.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES & others.

171 568
187 s 12

171 568
189 s207

Suffolk. January 25, 1898. — August 30, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Life Insurance — Equity — Appeal — Assignment — Husband and Wife — Suretyship — Guaranty — Promissory Note — Payment — Law and Fact — Finding — Pledge — Redemption.

If requests for rulings are in the alternative, and a decree is entered in accordance with one of them, and both parties appeal therefrom, upon a report of the case, all questions of law are open.

Where a policy of insurance provides that, if the assured is alive on a certain day, and the policy has not been terminated by lapse or his death, he has the option, first, to withdraw in cash the policy's entire share of the assets of the company, and also the surplus apportioned by the company, or, secondly, to convert the same into a paid up policy, and the assured and his wife, who is the beneficiary, assign absolutely their interest in the policy, guaranteeing the sufficiency of the assignment as security for the payment of a debt evidenced by a promissory note given by him, which is afterwards renewed without her knowledge, the contract of the wife is not one of suretyship; and although the guaranty contained in the assignment may have been lost by the giving of time, it does not affect the legal consequences of the assignment.

It cannot be said, as matter of law, that a promissory note given for the amount of a debt has been paid by the giving of a second note, but whether the latter operated as such payment is a question of fact depending on the intention of the parties and the other circumstances attending the transaction.

A. borrowed $1,900 of B., and gave his promissory note therefor payable in six months from date, with interest after maturity at the rate of two per cent a month, and A. and his wife, who was the beneficiary, assigned to B. their interest in a policy of insurance on A.'s life. Upon A.'s failure to pay the premiums on the policy, they were paid by B. The note was not paid at maturity, and A. gave B. a new note for the amount of the first note and interest, and the amount of the premiums paid by B., with interest at the rate of two per cent a month, reciting the assignment of the policy as collateral security therefor. After A.'s death, his wife brought a bill in equity to redeem the policy, and the judge found that she never consented that the policy should be pledged to B. as security for any debt other than "the note of $1,900 and interest thereon"; and that she had no knowledge or notice that B. claimed to hold the policy as security for any debt other than the "original debt of $1,900 and interest thereon" until after her husband's death, and did not authorize him to pledge it for any other debt. *Held*, that the finding was to be construed as a finding that the plaintiff pledged her interest in the policy as security for the original debt, and not for the original note.

The fact that an assignment by a husband and wife of their interest in a policy of

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insurance is absolute in form is immaterial, and the consideration and purpose of the transaction may be shown by oral evidence.

If a policy of insurance is pledged as security for the debt of the assured, and the pledgee pays the premiums in order to keep the policy alive, the beneficiary, who joined with the assured in pledging the policy, is entitled to redeem the policy only upon paying, in addition to the amount of the debt with interest thereon, the amount of the premiums paid by the pledgee, with interest from the time of each payment.

BILL IN EQUITY, filed July 29, 1897, in the Superior Court, against the Equitable Life Assurance Society of the United States, a corporation, Frank A. Russell, individually and as trustee, and the executors of the will of Daniel W. Russell, for the redemption and reassignment to the plaintiff of a policy of insurance. Hearing before *Richardson*, J., who found the following facts.

On or about September 29, 1893, Josiah B. Kendall, whose life was insured in the defendant corporation, borrowed for his own use of Daniel W. Russell the sum of $1,900, and gave his note therefor payable in six months from date, with interest after maturity at the rate of two per cent per month.

The policy was issued on July 29, 1882, by which the company promised to pay to the plaintiff, who was the wife of Kendall, for her sole use if living, and, if not living, to his children, or, if there were no children living, to his executors, administrators, or assigns, the sum of $10,000; and contained the following provision: "That upon the completion of the tontine dividend period, on July 25, 1897, provided this policy shall not have been terminated previously by lapse or death, the said Josiah B. Kendall shall have the option either, first, to withdraw in cash this policy's entire share of the assets, i. e. the accumulated reserve, which shall be thirty-five hundred and thirty-five $\frac{40}{100}$ dollars, in addition thereto the surplus apportioned by this society to this policy; secondly, to convert the same into a paid up policy for an equivalent amount."

On the same date, September 29, 1893, an assignment of the policy was made by the plaintiff and her husband to Frank A. Russell, trustee for Daniel W. Russell, of all their right, title, and interest in the policy, guaranteeing the validity and sufficiency of the assignment. The premiums upon the policy were payable quarterly, and upon the failure of Kendall to pay the pre-

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miums, Daniel W. Russell paid the premiums which became due in October, 1893, and in January and April, 1894; and thereafter, in June, 1894, Kendall having failed to pay the note for $1,900 at maturity, and also to pay the premiums so paid by Daniel W. Russell, entered into an agreement with the latter by which a new note was given by Kendall for the amount of the first note and interest, and the amount of the three premiums paid by Russell, which new note bore interest at the rate of two per cent per month, and recited that the assignment of the policy of insurance was held as collateral security therefor; and the original note of $1,900 was given up to Kendall. When the new note became due, Kendall and Russell agreed that another note should be given by Kendall in substantially the same form, the principal of which should be made up by computing the interest at the rate named in the existing note, namely, two per cent per month, adding thereto the amount paid for the quarterly premiums and the principal sum of the existing note, which new note should recite that the insurance policy was collateral security for the new note, in the same manner as provided by the original note. Russell thereafter paid all the premiums upon the policy quarterly, after demanding of Kendall that he should pay the same, and took new notes quarterly from time to time, made up in the manner above set forth, until the death of Russell, in 1895; and after his death the executors of his will, having made demand on Kendall for payment of the sum then due, continued to take his new notes quarterly at the same rate of interest, and pay the premiums to the insurance company, and each new note recited that the assignment of the policy to Frank A. Russell, trustee, was collateral security for the payment of the note, until April, 1897, when the last note was given, which was payable on demand, with "interest at the rate of two per centum per month for such further time as said principal sum or any part shall remain unpaid," and recited that the policy was deposited as collateral security.

Kendall died in June, 1897. Neither the defendants nor Daniel W. Russell in his lifetime, ever saw the plaintiff about this matter, or had any communication or dealings with her therein, and were ignorant as to any representations that were made to her by her husband, or by her to him, in respect to the

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assignment of the policy, and were also ignorant of the fact, "which I find as a fact, that she did not ever consent or agree that the policy should be pledged or held by said Russell as security for any debt other than the note of $1,900 and interest thereon. She had no knowledge or notice that the said Russell claimed to hold said policy as security for any debt other than the original debt of $1,900 and interest thereon, until after the death of said Josiah B. Kendall, nor did she authorize her husband to pledge it for any other debt."

The plaintiff contended, first, that, upon the foregoing facts, she was entitled to a reassignment of the policy without paying any amount to the defendants or any of them; secondly, that, if she was liable to pay anything to redeem the policy, she was entitled to an assignment upon paying the aggregate amount of the quarterly premiums paid by Russell, together with interest thereon from the date of the payment thereof, at six per cent per annum; or, thirdly, that in no event was she bound to pay more than the amount of the original loan with interest at six per cent and the quarterly premiums, with interest thereon at six per cent per annum from the date of payment.

The defendants contended that they were not bound to reassign the policy except upon payment to them of the full amount of the last note given by Kendall. The amount of this note was made up from the original loan of $1,900, together with interest thereon at the rate of two per cent per month, compounded quarterly from the date of the maturity of the loan, together with the amount of the quarterly premiums, with interest on each amount from the date of its payment at two per cent per month compounded quarterly. The defendant corporation is willing and ready to pay the amount of the policy to the person or persons entitled to the same.

The judge ruled, on these facts, that the plaintiff was entitled to a reassignment of the policy on payment to the defendant executors of the amount of the original loan, with interest at the rate of six per cent since the date of that loan, and the amount of all the premiums paid by Daniel W. Russell or his estate, with interest on each premium from the date of the payment of it to the date it was repaid, at the rate of six per cent per annum; and ordered a decree to be entered accordingly. Both

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the plaintiff and the defendants appealed therefrom; and thereupon, at the request of all the parties, the judge reported the case for the determination of this court.

S. L. Whipple, (*W. R. Sears* with him,) for the plaintiff.

R. M. Morse & E. M. Johnson, for the defendants.

LATHROP, J. The defendants other than the assurance society contend that, as the justice who heard the case decided it in favor of the plaintiff's third contention, she is not a party aggrieved, within the Pub. Sts. c. 151, § 13, and has no right of appeal. For this position *Copp* v. *Williams*, 135 Mass. 401, and *Downs* v. *Bowdoin Square Baptist Society*, 149 Mass. 135, are cited. These cases state the familiar rule that, if a party asks for a certain ruling and it is given, he has no ground of exception. But the contentions in the case before us were in the alternative, and the plaintiff would not be precluded from arguing the correctness of the other contentions, if the case came here on exceptions. The case is here on a report, after an appeal by both parties, and all questions of law are open.

The first contention of the plaintiff is that on the facts of the case the plaintiff is entitled to a reassignment of the policy without paying any amount to the defendants or any of them. The argument in support of this contention is that the contract on the part of the wife was one of suretyship, and that the note was paid by the renewal of it without her knowledge. We are of opinion, however, that the wife did not stand in the relation of a surety to her husband. Both she and her husband at the time of the assignment had an interest in the policy. By its terms, on July 25, 1897, provided the policy had not been terminated by lapse or by his death, he had the option, first, to withdraw in cash the policy's entire share of the assets of the insurance society, namely, the accumulated reserve, which was expressed to be $3,535.40, and in addition thereto the surplus apportioned by the insurance society; or, secondly, to convert the same into a paid up policy. The interest of the wife was contingent upon her husband's death before July 25, 1897. Each could assign his or her interest. But neither could assign the interest of the other, or defeat it in any way. The fact that it was payable to him in a certain contingency, which did not happen, is immaterial. *Pingrey* v. *National Life Ins. Co.* 144 Mass. 374, 383.

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The husband and wife having these interests in the policy, the husband wished to pledge it for his debt, and obtained the assignment of the policy by the wife, absolute in form. We see in this alone no contract of suretyship. While the guaranty contained in the assignment may have been lost by the giving of time, it does not affect the legal consequences of the assignment.

We are also of opinion that the note given for the original debt cannot, as matter of law, be said to have been paid by the second note. Whether this note operated as payment of the first note was a question of fact, depending on the intention of the parties and the other circumstances attending the transaction. *Agawam National Bank* v. *Downing*, 169 Mass. 297.

The plaintiff's second contention in the court below was, that, if she was liable to pay anything to redeem her policy, she was entitled to an assignment upon paying the aggregate amount of the quarterly premiums paid by the Russells, together with interest thereon from the date of the payment thereof at six per cent per annum. The third contention was, that in no event was she bound to pay more than the amount of the original loan with interest at six per cent and the quarterly premiums, with interest thereon at six per cent from the date of payment. The judge entered a decree in favor of the plaintiff, based upon her third contention.

The findings of fact do not make it entirely clear whether the plaintiff pledged her interest in the insurance policy as security for the original debt or for the original note. The judge finds as a fact "that she did not ever consent or agree that the policy should be pledged or held by said Russell as security for any debt other than the note of $1,900, and interest thereon. She had no knowledge or notice that the said Russell claimed to hold said policy as security for any debt other than the original debt of $1,900, and interest thereon, until after the death of said Josiah B. Kendall, nor did she authorize her husband to pledge it for any other debt." The note was for $1,900, payable six months from date, with interest after maturity at the rate of two per cent a month. This was a legal contract by the plaintiff's husband, who signed it. Pub. Sts. c. 77, § 8. He at least was bound to pay the interest stipulated until payment or until

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the claim for principal and interest was judicially determined. *Brannon* v. *Hursell*, 112 Mass. 63. *Union Institution for Savings* v. *Boston*, 129 Mass. 82. *Lamprey* v. *Mason*, 148 Mass. 231. *French* v. *Bates*, 149 Mass. 73, 79. *Handy* v. *Tracy*, 150 Mass. 524. *Schmidt* v. *People's National Bank*, 153 Mass. 550. *McDonald* v. *Faulkner*, 154 Mass. 34.

If, therefore, the finding of the judge is to be construed as a finding that the plaintiff pledged her interest in the policy as security for the note, a different rate of interest should have been allowed. But we do not so construe the finding. The latter part of the finding refers directly to the original debt, and the decree is based upon this finding.

The next question is as to the effect of the assignment of the policy, which was in form absolute. If the only authority which the wife gave the husband was to pledge her interest in the policy for the original debt, he was not her agent either to make the original note in the form in which it was made, or to make new notes; and the fact that the assignment was absolute in form is immaterial. The consideration and the purpose of the transaction could be shown by oral evidence. *Riley* v. *Hampshire County National Bank*, 164 Mass. 482, 486.

The first part of the decree was, therefore, right.

The remaining question is as to the correctness of the last part of the decree, which obliges the plaintiff to repay the amount of all the premiums paid by Daniel W. Russell or his estate, with interest on each premium from the date of its payment to the date of repayment, at the rate of six per cent per annum.

We are of opinion that the decree in this respect was right. The plaintiff joined in pledging the property as security for a debt. The pledgee had to pay the premiums in order to keep the policy alive. We have already said that she must pay the debt with simple interest thereon; and it is only equitable that she should repay the premiums paid by the pledgee, with simple interest from the time of each payment. This is not the case of a mere volunteer paying the premiums, or the part owner of a policy, as in *In re Leslie*, 23 Ch. D. 552. Nor is it the case of a payment made by a mortgagor to preserve the property, as in *Falcke* v. *Scottish Imperial Ins. Co.* 34 Ch. D. 234. It is the case of a payment by a pledgee, who had a right, as against the

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pledgor, to keep the pledge alive. See *Warnock* v. *Davis*, 104 U. S. 775; *Scobey* v. *Waters*, 10 Lea, 551; *Harley* v. *Heist*, 86 Ind. 196; *Raley* v. *Ross*, 59 Ga. 862. *Decree affirmed.*

EDWARD S. HOWE *vs.* CITY OF LOWELL.
JOSEPH M. WILSON & another *vs.* SAME.
GEORGE L. GOODALE *vs.* SAME.
THOMAS J. UNDERWOOD *vs.* SAME.
SAME *vs.* SAME.
JOSEPH M. WILSON & another *vs.* SAME.

171 575
203 *150

Middlesex. March 16, 1898. — August 30, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Writ of Entry — Amendment — "Boulevard" — Deed — Condition — Breach — Waiver.

At the trial of a writ of entry to recover land conveyed to a city upon the conditions that a portion of it should be laid out as a highway and the remainder used as a park or boulevard, and that a failure to do either should work a forfeiture, it is within the power of the judge to allow an amendment of the description of the land contained in the writ, which did not include the part laid out as a highway, so as to include all the land described in the deed.

A speedway or driveway seventy-five feet wide running parallel with a public street and distant twenty-five feet therefrom, the intervening space being turfed over and planted with shade trees, the northerly line of the street and the southerly line of the speedway being also planted with trees, is a "boulevard," within the meaning of the condition in a deed that the land "shall be improved, dedicated, and forever used by the grantee as and for a common, park, or boulevard, and for no other purpose."

The grantee of land in fee is entitled to make any use of it not prohibited by the conditions in the deed, whether the parties thought of it or not.

The construction and maintenance by a city of a system of pipes below the surface of the ground, for the purpose of obtaining and distributing water to its inhabitants, do not constitute a breach of the condition in the deed of the land to the city, that it "shall be improved, dedicated, and forever used by the grantee as and for a common, park, or boulevard, and for no other purpose"; nor do the experiments made on the land incidental to the subsequent use and temporary in character, by driving iron pipes into the ground, the surface of which is left in a disturbed condition to some extent, constitute such a breach.

The erection and maintenance by a city, for supplying its inhabitants with water, of a pumping station composed of a steam pump, engine, and boiler placed in a

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building upon land conveyed to the city by a deed containing the condition that it "shall be improved, dedicated, and forever used by the grantee as and for a common, park, or boulevard, and for no other purpose," are a breach of the condition.

If the judge presiding at the trial of a writ of entry to recover land alleged to have been forfeited rules that, on the facts found, there was no waiver by or estoppel against the demandant, whether this is a ruling of law or a finding of fact, it is to be sustained, unless the facts found, as matter of law, require a different ruling or finding; and on the facts before it in the present case, this court cannot say that the rulings or findings upon this part of the case are erroneous.

If land is conveyed to a city upon the conditions that a portion of it shall be laid out as a highway and the remainder used as a park or boulevard, and that a failure to do either shall work a forfeiture, the bringing of a writ of entry to recover the land, the description of which does not include the part laid out as a highway, and which is cured afterwards by an amendment containing such description, is not a waiver of the breach of the conditions in the deed.

SIX WRITS OF ENTRY, to recover land in Lowell. The cases were tried together in the Superior Court, without a jury, before *Richardson*, J., who found for the demandants in each case; and, by agreement of the parties, reported the cases for the determination of this court. The demandant or demandants in each case had conveyed by deed a lot of land to the city of Lowell, and they bring these writs to recover the land, on the ground that the city has violated the conditions in the deeds. The facts appear in the opinion, and in the notes of the reporter thereto.

F. W. Qua, (*H. A. Brown* with him,) for the tenant.

F. N. Wier, for the demandants.

FIELD, C. J. These are six writs of entry, to recover possession of six different lots of land, which are designated on the plan as lots A, B, C, D, E, and F, and each writ relates to one lot. The plea in each case is *nul disseisin*, with a specification of an equitable defence by way of estoppel under St. 1883, c. 223, § 14, and a claim for an allowance for improvements under Pub. Sts. c. 173, § 19. Lot A was conveyed to the city of Lowell by deed dated January 17, 1890; lot B, by deed dated December 20, 1889; lot C, by deed dated January 30, 1890; lot D, by deed dated December 17, 1889; lot E, by deed dated April 14, 1890; and lot F, by deed dated December 20, 1889. Each of the deeds except that of lot E conveyed but one parcel of land, and after the description of the parcel contained the following conditional clauses:

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"This conveyance is made on the express condition that the grantee shall, within three years from the date hereof, lay out and construct, and thereafter forever maintain, a public highway over the within described premises at least fifty feet in width, having the northerly line of the within described premises as the northerly line of such highway, and also on the express condition that that part of said premises not taken or used for said highway shall be improved, dedicated, and forever used by the said grantee as and for a common, park, or boulevard, and for no other purpose; and that if said grantee shall fail to keep and perform said conditions, or either of them, then and in such event this deed shall become and be absolutely null and void, and all and singular the above described premises, and all improvements and betterments thereon shall revert to and reinvest in me, the said grantor, and my heirs and assigns, as fully, completely, and effectually as if these presents had not been executed. . . . The right to take ice on the Merrimack River where it flows over the premises herein conveyed is hereby expressly reserved to the grantors, their heirs and assigns, or other person or persons who now have that right. It is, however, understood that the grantors, their heirs and assigns, or other person or persons above mentioned shall not have the right to pass over or cross any part of said premises except such as is covered by the river or such part as is or may be laid out or in use as a public highway, public road, or ferryway."

The deed which conveyed lot E conveyed two other lots, the first lot, lot E, containing about 3.49 acres, the second about 575 square feet, and the third about 1.87 acres. After the description of the first lot, the deed contained this clause:

"The conveyance of this lot is made on the express condition that the grantee shall, within three years from the date hereof, lay out and construct, and thereafter forever maintain, a public highway over the above described premises at least fifty feet in width, having the northerly line of the above described premises as the northerly line of such highway; and also on the express condition that that part of the above described premises not taken or used for such highway shall be improved, dedicated, and forever used by the grantee as and for a common, park, or boulevard, and for no other purpose."

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After the description of the second and third lots, the deed contained this clause:

"The conveyance of the last two described lots is made on the express condition that the grantee shall, within three years from the date hereof, lay out said last two described lots as a public highway, and construct and thereafter forever maintain said public highway; and the conveyance of all the above described premises is made on the express condition that, if the grantee shall fail to keep and perform said conditions, or either of them, then and in such event this deed shall become and be absolutely null and void, and all and singular the above described premises, and all improvements and betterments thereon, revert to and reinvest in me, the said grantor, and my heirs and assigns, as fully, completely, and effectually as if these presents had not been executed. . . . The right to take ice found on the Merrimack River where it flows over the premises herein conveyed is hereby expressly reserved to the grantor, his heirs and assigns, or other person or persons who now have that right. It is however understood that the grantor, his heirs and assigns, or other person or persons above mentioned, shall not have the right to pass over or cross any part of said premises, except such as is covered by the water of the river, or such part as is laid out as a public highway."

We do not understand that the deeds conveyed these lands to the city expressly to be held for the purpose of a common, park, or boulevard, but that they conveyed them to the city without limitation, except as provided in the conditions in the deeds. Copies of the deeds are not before us.

The report of the presiding justice recites as follows: "After counsel for the demandants had made his opening, counsel for the tenant inquired if the description of the premises demanded in the several writs covered and corresponded with the description of the premises conveyed in the several deeds to the city. Counsel for demandants replied that the descriptions in the writs were the same as those in the deeds, except that that portion of the several tracts conveyed to the city by said deeds which had been laid out as a public street was not included in the description in the writs, and stated that neither of the demandants made any claim to the land within the limits

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of said public street, alleging as a reason that that land had been taken by right of eminent domain for a street. Counsel for the tenant then claimed and requested the court to rule that, as the demandants had brought their actions for a part only of the land to which the condition attached, they had thereby waived the condition as to the remaining portion of the land, and such waiver operated to destroy the condition *in toto*, so that these actions cannot be maintained. Without making any ruling at that time on the question thus raised, I allowed the trial to proceed, and on the second day of the trial, after a portion of the evidence was in, on motion of counsel for demandants, against the objection of the tenant, I allowed each of the demandants so to amend the description of land contained in each writ that, as amended, all the land described in the several deeds of the demandants to the city of Lowell was included in such amended descriptions, and was claimed to have been forfeited. There was no other evidence offered as to whether the writs as amended were for the cause of action intended in and by the writs as originally brought." We are of opinion that it was within the power of the court to allow these amendments.

The presiding justice found the facts, a part of which appear in the margin.* We understand that the speedway was

* The judge found the following facts, in addition to those appearing in the opinion. In 1889 and 1890, the city purchased a strip of land along the northerly bank of the Merrimack River about one and one half miles long and from two hundred to six hundred feet wide, the lands conveyed by the deeds above mentioned being the westerly portion of the strip; and, in pursuance of a resolution of the city council, a public street fifty feet in width was laid out and accepted, such street running longitudinally through said strip of land. Within three years from the date of any of the deeds of the demandants, besides the street, a driveway or "speedway," so called to distinguish it from the street, was constructed through said strip of land seventy-five feet wide, running parallel with the street and distant twenty-five feet therefrom, the intervening space being turfed over and planted with shade trees, the northerly line of the street and the southerly line of the speedway being also planted with trees; but very little more, if anything, has been done on the lands in question.

In 1891, 1892, and 1895, the city, for the purpose of obtaining a supply of water by means of driven or artesian wells, drove a number of iron pipes two and a half inches in diameter into the ground upon the land in question. After the experiments of both 1891 and 1892, which proved unsatisfactory, one or two of these pipes were left in the ground. In 1892 the

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southerly of the public highway, but not a part of it, and that the demandants concede that the highway was properly laid out. The first ruling of the court is as follows: "That the construction and maintenance by the city of said wells and pipes and pumping station, and the work done in connection therewith, and other facts found, constitute a breach of the condition contained in each of the six deeds first above described."

As the highway has been constructed, the question is whether there has been a breach of the conditions that the parts of the premises not taken for a highway "shall be improved, dedicated, and forever used by the grantee as and for a common, park, or boulevard, and for no other purpose." The title in fee to all the parcels vested in the city of Lowell, subject to conditions subsequent by the breach of which its title would be devested, and would revest in the grantors and their heirs. The subterranean waters in the parcels were a part of the parcels, and the grantors in the deeds have not reserved to themselves the property in these waters, while the deeds are in force. The grantors owned other lands northerly of the lands granted to the city, and they had an interest in imposing the conditions that the lands granted, so far as they were not used for a highway, should be "improved, dedicated, and forever used as a common, park, or boulevard." From the form of the conditions, it is apparent that the city could use the lands in part as a common, in part as a park, if

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ground was dug up and left in a rough condition, one or two pipes were left projecting above the surface, and in a number of cases where the pipes were removed the holes were not filled in, so that it was hardly safe to walk over it; some trees originally on the land at the time of the conveyance were destroyed, and a sluiceway was dug to carry off waste water, and refuse coal was left upon the ground. The experiments of 1895 proved a success, and a permanent source of water supply has been established on this land. One hundred and forty such pipes have been driven into the ground. A large pipe connects these pipes with an engine, which is located in a building on lot A. These iron pipes have been driven into the ground below the surface out of sight. From this engine-house a large iron pipe runs longitudinally in the speedway underground through each lot of land. This pipe carries the water by gravity into the conduit of the city. For a few weeks in 1895, while this water plant was in the experimental stage, the iron pipes which had been so driven projected above the ground, and the pipe connecting them with the engine was not covered. The speedway was dug up and substantially closed to public travel for about two weeks while the longitudinal pipe was being laid.

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there be any distinction between a common and a park, and in part as a boulevard. The word "boulevard," as now commonly used in this Commonwealth, has not a very definite meaning. It sometimes means little more than a wide street or highway. In the Century Dictionary it is said, "The name is now sometimes extended to any street or walk encircling a town, and also to a street which is of especial width, is given a park-like appearance by reserving spaces at the sides or centre for shade trees, flowers, seats, and the like, and is not used for heavy teaming." It seems to us that the speedway may properly be said to be a boulevard, within the meaning of that word in the conditions of the deeds. The ruling of the presiding justice indicates that he was of that opinion, for he ruled only that the construction and maintenance by the city of said wells and pipes and pumping station, and the work done in connection therewith, and the other facts found, constituted a breach of the conditions. Except as to lot A, the question is whether the construction and maintenance by the city of Lowell, as shown by the report of the system of pipes below the surface of the ground, for the purpose of obtaining and distributing water to the inhabitants of the city, constitute a breach of the conditions.

In *Wellington, petitioner*, 16 Pick. 87, 99, the terms of the grant of the town commons by the proprietors of common and undivided lands to the town of Cambridge were that "the same is hereby granted to the town of Cambridge, to be used as a training field, to lie undivided, and to remain for that use forever, provided, nevertheless, that if the said town should dispose of, grant, or appropriate the same, or any part thereof, at any time hereafter, to or for any other use than that aforementioned, then, and in such case, the whole of the premises hereby granted to the said town shall revert to the proprietors granting the same," etc. Of this the court say: "By the grant the town became owners of the soil with full power, as such owners, to make any use of the property which owners of land can make, subject only to the restraint and limitation expressed in the condition. All such limitations and restrictions, especially those which go to create a forfeiture, are to be construed strictly, and not to be extended beyond the plain terms of the clauses in which they are expressed, and the obvious purposes for which they are intro-

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duced. Any other construction would impose a useless embarrassment upon the rights of property in the grantee, without benefit to the grantor. It appears to us, construing this grant according to these rules, that the intent of the restriction and condition in this deed was, that the lands should remain common and open, in contradistinction to being divided to be held in severalty, and appropriated to private use, and that no disposition or appropriation should be made of it, inconsistent with its use as a training field."

In *French* v. *Quincy*, 3 Allen, 9, it is said in the opinion: "It is sufficient if a condition is performed in substance."

In *Crane* v. *Hyde Park*, 135 Mass. 147, it is said in the opinion: "The demandants' claim is *strictissimi juris*. It is well settled that such a condition, when relied upon to work a forfeiture, is to be construed with great strictness."

In *McKelway* v. *Seymour*, 5 Dutch. 321, 327, it is said in the opinion: "So long as the land was used primarily and mainly for the purposes of a raceway, and the embankment necessary to support it, any use of it for other purposes, either by the water power company or by other persons, with or without their consent, so long as these uses were not inconsistent with its use for the main purpose, could not operate as a breach of the condition. The condition is to be construed in accordance with the manifest intention of the parties and the end they had in view. Conditions, when they tend to defeat estates, are *stricti juris*, and to be construed strictly." See *Rose* v. *Hawley*, 141 N. Y. 366; *Southard* v. *Central Railroad*, 2 Dutch. 13.

It seems to us in the present cases that the conditions were intended to relate to the use to be made of the surface of the lands granted. We think that the demandants, continuing to be the owners of adjoining lands, provided that the lands granted to the city should be used only for a public highway, common, park, or boulevard, and for no other purpose, because uses for other purposes might be detrimental to their adjoining estates. The presiding justice has found "that the use of the land for the purpose of driving wells and drawing water therefrom, and the erection of engines and boiler-house, are uses and purposes not in the minds of the grantors, or even of the grantee, when the deeds were given." As the grantee took

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the lands in fee, it is entitled to make any use of the lands not in violation of the conditions in the deeds, whether the parties thought of it or not. It is not a new use to lay water pipes in lands taken and used as a highway. Water pipes are sometimes laid in and through commons and lands taken or purchased for a public park, but we are aware of no case in which it has been held that it requires a new taking to do this, or that such a laying of pipes is not within the terms of the deeds granting lands for these purposes. On the theory of the demandants, the subterranean waters of the lands cannot be used by the city without forfeiting the lands, and cannot be used by themselves because they have not reserved the waters or excepted them from the grant. We are of opinion that the contention of the tenants is the more reasonable one, namely, that the conditions mean that the lands shall be used for a common, park, or boulevard, and for no other purpose which shall interfere or be inconsistent with such use. The experiments made on the lands were but incidental to the use afterwards made of the lands in obtaining a water supply for the city, and were temporary in character and cannot be held to work a forfeiture of the lands if the construction and maintenance of the system of pipes are not a breach of the conditions. As the pipes are laid below the surface of the ground, and do not interfere with the use of the surface as a common, park, or boulevard, except when it is necessary to clean or repair these pipes, we are of the opinion that the construction and maintenance of the system of pipes do not constitute a breach of the conditions in the deeds.

With reference to lot A; the presiding justice found that "the pump used for raising the water from said wells into said large iron pipe is a steam pump, and, together with the engine and boiler for operating the same, is placed in a wooden building, which is about forty feet square, situated on the lot marked A"; and that "it is the intention of the city also soon to replace the wooden building upon said lot A, used for the pumping station, with a new structure of brick or stone constructed with artistic taste, and which may be made an attractive feature of the landscape." It may be, when large tracts of land are granted for a public park, that a pumping station for irrigating the land granted, or for supplying it with water sometimes would be reasonably

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necessary for the maintenance of the park. But this pumping station was not erected, and is not used for that purpose. So far as appears, none of the water is used on the lands granted, but it is a pumping station for supplying the inhabitants of the city of Lowell with the water. The city has been authorized by the Legislature to take and hold lands and erect buildings and other structures for the purpose of obtaining a supply of water for its inhabitants. St. 1893, c. 412. St. 1870, c. 321. By Pub. Sts. c. 27, § 50, the selectmen of towns are authorized to establish and maintain such public drinking troughs, wells, and fountains within the public highways, squares, and commons of their respective towns as in their judgment the public necessity and convenience may require, and this section applies to cities. Pub. Sts. c. 28, § 2. Pub. Sts. c. 54, § 16, provide that "no building exceeding six hundred square feet in area upon the ground shall be erected in or upon a common or park dedicated to the use of the public, without leave of the General Court." These statutes, however, have no application to the present cases, because the question is whether the conditions contained in the deeds have been broken. As the building erected on lot A, with its boilers and engines, is not incidental to the maintenance of a common, park, or boulevard, the erection and maintenance of it seem to us inconsistent with the use of the surface of the land solely for a common, park, or boulevard. It is a distinct and different use of the surface of the land, and we are of opinion that the construction and maintenance of this building in the manner and for the purposes shown by the report are a breach of the condition contained in the deed of lot A. This is the land demanded in the first named action, that of *Howe* v. *Lowell*.

Has the demandant Howe waived this breach, or is he estopped from insisting upon it? The presiding justice ruled on the facts found that there was no waiver or estoppel. Whether this is a ruling of law or a finding of fact, it is to be sustained unless the facts found, as matter of law, require a different ruling or finding. It is to be noticed that the terms of the deed were equally well known to both parties, and whether the city was violating the condition of the deed was a matter of which the city could judge as well as Howe. Howe did nothing actively to induce the city to erect the pumping station. He simply stood by and saw it

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done without making objection, and he afterwards gave a deed to the city of another lot of land, in which reference is made to the right of the city to throw steam or hot water from its engine or pumping station into the river at any point on the bank. Underwood gave a similar deed of another lot.* The presiding justice has found "that neither Howe nor Underwood intended the conveyance of these lots of land, or any of the other acts done by them, as a waiver of any of the conditions in any of the other previous deeds." All the evidence on which the justice made this finding is not before us. It is not found that the city understood that Howe had waived any of the conditions contained in his deed, and that it relied on this waiver in proceeding to erect the pumping station. The inference to be drawn from the report is perhaps the other way. On the facts before us we cannot say that the rulings or findings on this part of the case are erroneous.

The bringing of the action for a part only of the land, a defect which was cured by the amendments allowed by the court, was not, we think, a waiver of the breach of the conditions. It was a natural mistake, the reasons for which appear; there was no intention to waive the breach, and the law does not attribute any such absolute effect to such a mistake.

The ruling of the presiding justice with reference to the claim for the value of improvements is as follows: "5. That on these facts, and there being no evidence of the value of the improvements to, if of any value to, the demandants, having been put in, the tenant is not entitled to any compensation in either of said actions for the value of improvements made by it on the demanded premises, and found for the demandants in each case, and the tenant excepted." This ruling is general, and relates to all the cases. The report concludes as follows: "By agreement of the parties I report the cases to the Supreme Judicial Court for its determination; if the above rulings are correct in law, and said amendments were properly allowed, judgment is to be entered for the demandant in each case. If either of the first four

* The judge found also that, soon after the work of driving the wells had begun, Howe, Underwood, and Wilson met and came to an understanding, at Wilson's suggestion, that they would not then make any objection to the work, or say anything about their rights under the conditions in the deeds.

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rulings as to any of these cases is not correct, then in that case judgment is to be entered for the tenant. If judgment is to be entered for any of the demandants, and the fifth ruling is erroneous, then the cases in which such judgment is rendered may, if the Supreme Judicial Court shall decide that it ought to be done, be sent back to the Superior Court for the assessment of the sums to be allowed for improvements." In Howe's case, whether the demandant is entitled to anything for rents and profits, and whether the tenant is entitled to anything for the value of improvements, are questions which have not been fully argued in this court, and we doubt whether they were fully presented to the Superior Court. We therefore think it best to leave these questions open for the further consideration of that court. See Pub. Sts. c. 173, §§ 21, 28.

According to the terms of the report there must be judgment for the tenant in each of the cases, except in that of *Edward S. Howe* v. *City of Lowell.* In that case there must ultimately be judgment for the demandant; but the questions whether the demandant should recover anything for rents and profits, and the tenant should recover for the value of improvements, are to be determined by the Superior Court. *So ordered.*

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HENRY L. HIGGINSON & others *vs.* ALFRED T. TURNER & another.

Suffolk. March 21, 1898. — August 30, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Will — City as Trustee of Fund — Petition for Appointment of New Trustees.

Under the will of Benjamin Franklin, proved in Philadelphia in 1790, giving a certain sum of money to the inhabitants of the town of Boston in trust, to "be managed under the direction of the selectmen, united with the ministers of the oldest Episcopalian, Congregational, and Presbyterian churches in that town," the city of Boston holds the fund in trust and is the trustee, and the appointment by the Probate Court of certain citizens of Boston as trustees is inoperative and void, and they are not entitled to the possession and control of the fund, as against the city.

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BILL IN EQUITY, by Henry L. Higginson and six others, all of Boston, against the treasurer of the city of Boston and the city of Boston, to obtain possession of a certain trust fund.

The bill alleged that Benjamin Franklin, in a codicil to his will duly proved in Philadelphia, in the State of Pennsylvania, in 1790, provided as follows:

"I devote Two thousand Pounds Sterling, which I give, one thousand thereof to the Inhabitants of the Town of Boston, in Massachusetts, and the other thousand to the Inhabitants of the City of Philadelphia, in Trust to and for the Uses, Interests, and Purposes hereinafter mentioned and declared.

"The said sum of One thousand Pounds Sterling, if accepted by the Inhabitants of the Town of Boston, shall be managed under the direction of the Select Men, united with the Ministers of the oldest episcopalian, Congregational, and Presbyterian Churches in that Town; who are to let out the same upon Interest at five per cent per Annum to such young married artificers, under the Age of twenty-five years, as have served an Apprenticeship in the said Town, and faithfully fulfilled the Duties required in their Indentures, so as to obtain a good moral Character from at least two respectable Citizens, who are willing to become their Sureties in a Bond with the Applicants for the Repayment of the Monies so lent with Interest according to the Terms herein (B. Franklin) after prescribed. All which Bonds are to be taken for spanish milled Dollars or the value thereof in current Gold Coin. And the Managers shall keep a bound Book or Books wherein shall be entered the Names of those who shall apply and receive the benefit of this Institution and of their Sureties, together with the Sums lent, the Dates, and other necessary and proper Records, respecting the Business and Concerns of this Institution. And as these Loans are intended to assist young married Artificers in setting up their Business, they are to be proportioned by the discretion of the Managers, so as not to exceed Sixty Pounds Sterling to one Person, nor to be less than Fifteen Pounds. And if the number of Appliers so entitled should be so large as that the sum will not suffice to afford to each as much as might otherwise not be improper, the proportion to each shall be diminished so as to afford to every one some Assistance. These aids may therefore be small at first; but as the

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Capital increases by the accumulated Interest, they will be more ample. And in order to serve as many as possible in their Turn, as well as to make the Repayment of the principal borrowed more easy, each Borrower shall be obliged to pay with the yearly Interest one tenth part of the principal, which Sums of Principal and Interest so paid in shall be again let out to fresh Borrowers. And as it is presumed that there will always be found in Boston virtuous and benevolent Citizens willing to bestow a part of their Time in doing good to the rising Generation by Superintending and managing this Institution gratis, it is hoped that no part of the Money will at any time lie dead or be diverted to other purposes, but be continually augmenting by the Interest, in which case there may in time be more than the occasions in Boston shall require, and then some may be spared to their Neighboring or other Towns in the said State of Massachusetts who may desire to have it, such Towns engaging to pay punctually the Interest and the Portions of the principal annually to the Inhabitants of the Town of Boston.

"If this Plan is executed and succeeds as projected without interruption for one hundred Years, the Sum will then be one hundred and thirty-one thousand Pounds, of which I would have the Managers of the Donation to the Town of Boston then lay out at their discretion one hundred thousand Pounds in Public Works which may be judged of most general utility to the Inhabitants, such as Fortifications, Bridges, Aqueducts, Public Buildings, Baths, Pavements, or whatever may make living in the Town more convenient to its People, and render it more agreeable to strangers, resorting thither for Health or a temporary residence. The remaining thirty-one thousand Pounds I would have continued to be let out on Interest in the manner above directed for another hundred Years, as I hope it will have been found that the Institution has had a good effect on the conduct of Youth, and been of Service to many worthy Character and useful Citizens. At the end of this second Term, if no unfortunate accident has prevented the (B. Franklin) operation, the sum will be Four Millions and Sixty-one thousand Pounds Sterling, of which I leave one Million sixty-one Thousand Pounds to the Disposition of the Inhabitants of the Town of Boston, and Three Millions to the disposition of the Government of the State, not presuming to carry my views farther.

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"All the directions herein given respecting the Disposition and Management of the Donation to the inhabitants of Boston, I would have observed respecting that to the Inhabitants of Philadelphia; only as Philadelphia is incorporated, I request the Corporation of that City to undertake the Management agreeable to the said Directions. . . .

"It is my desire that this Institution should take place and begin to operate within one year after my decease; for which purpose due Notice should be publickly given previous to the expiration of that Year, that those for whose Benefit this establishment is intended may make their respective applications; And I hereby direct my Executors, the survivors or survivor of them, within six Months after my decease, to pay over the said Sum of Two thousand Pounds Sterling to such Persons as shall be duly appointed by the Select Men of Boston and the Corporation of Philadelphia, to receive and take charge of their respective Sums of One thousand Pounds each, for the Purposes aforesaid.

"Considering the accidents to which all human Affairs and Projects are subject in such a length of Time, I have perhaps too much flattered myself with a vain Fancy that these Dispositions, if carried into execution, will be continued without interruption, and have the Effects proposed: I hope, however, that if the Inhabitants of the two Cities should not think fit to undertake the execution they will at least accept the offer of these Donations as a Mark of my good-Will, a token of my Gratitude, and a (B. Franklin) Testimony of my earnest desire to be useful to them even after my departure. I wish indeed that they may both undertake to endeavour the Execution of the Project."

The bill further alleged that until Boston became a city, in 1822, the fund was managed by the selectmen, nine in number, with certain ministers named; that there had been no selectmen since 1822; that no trustees were appointed by any court in the Commonwealth until March 18, 1897, when, by a decree of the Probate Court of the county of Suffolk, the plaintiffs were duly appointed trustees to manage the fund; that after the act of incorporating the city went into effect in 1822, and until the adoption of the revised charter of the city in 1854, the fund was managed by the mayor and aldermen of the city, eight in num-

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ber, together with certain ministers; that after the adoption of the revised city charter in 1854, the aldermen, then being twelve in number, together with the ministers, acted as managers of the fund until the year 1893; that since and including the year 1893 the aldermen, twelve in number, with the ministers of the three churches designated in Franklin's will, have acted as such managers; that different persons have acted as treasurers of the fund, Mr. William Minot being such treasurer from 1811 until 1866; that in 1866 Frederick U. Tracey, then the treasurer of the city, was elected treasurer of the fund and continued such until 1876, when he was succeeded in the office of treasurer by Samuel F. McCleary, who was then the city clerk; that McCleary acted as treasurer of the fund and also as city clerk until 1885, when he ceased to be city clerk, and since that time has acted as treasurer of the fund in his personal capacity; that on December 28, 1893, at a meeting of the persons acting as managers of the fund, seven aldermen and the rector of Christ Church being present, the following vote was unanimously passed:

"Ordered, that the sum set apart from the general Franklin Fund, as due to the City of Boston, on July first, 1893, viz. Three Hundred and Twenty-Two Thousand Four Hundred and Ninety and 20/100 Dollars ($322,490.20), with its accumulations, be paid by the treasurer of the fund in January next to the City Treasurer to constitute a special fund for the purchase of land and for the erection thereon of the Franklin Trades School and the equipment of the same; said expenditures to be made under the direction of such department as may for the time being be charged by the statutes and ordinances with the duty of erecting and furnishing public buildings in the City of Boston. The location of and plans for said school to be approved by the managers of said fund."

The bill further alleged that thereupon McCleary paid over to the city of Boston by payment to one Turner, the city treasurer, a large portion of the fund, and certain accumulations of interest, the same being now held by said Turner and said city; that the vote passed on December 28, 1893, by those assuming to act as managers of the fund, was invalid and inoperative, and did not lawfully dispose of the fund; and that the plaintiffs were entitled to the possession of the fund and its accumulations, and had re-

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quested the city and Turner to pay to them the portion thereof held by them, but that they had refused so to do, and claimed to hold the same upon special trusts.

The prayer was that the defendants be enjoined from paying over the fund to any one but the plaintiffs; that until such payment the defendants hold the same to the uses and for the benefit of the plaintiffs as trustees upon trusts established by the codicil; and that the defendants be directed to pay the moneys received by them to the plaintiffs, discharged of all trusts except those imposed by the codicil.

The respondents asked that the bill be dismissed, with costs.

The case was reserved by *Allen*, J., upon the bill and answer, for the consideration of the full court.

The case was argued at the bar in March, 1898, and afterwards was submitted on briefs to all the justices.

T. M. Babson, for the defendants.

S. Lincoln, for the plaintiffs.

ALLEN, J. There can be no doubt that the title to the fund now in question was at the outset in the town of Boston. The gift was to the inhabitants of the town, in trust for the purposes specified, and was to be accepted by them. It is afterwards spoken of in the codicil as the donation to the town of Boston, and again as the donation to the inhabitants of Boston.

It is now well settled that a town may, in its corporate capacity, accept a gift of real or personal estate left to it in trust for charitable purposes, and may act as trustee and execute the trust. *Drury* v. *Natick*, 10 Allen, 169, 182. *Webb* v. *Neal*, 5 Allen, 575. *Nourse* v. *Merriam*, 8 Cush. 11, 19. *Green* v. *Putnam*, 8 Cush. 21. *Worcester* v. *Eaton*, 13 Mass. 371. *Vidal* v. *Philadelphia*, 2 How. 127, 190. Dillon Mun. Corp. (4th ed.) §§ 567–573.

The city of Boston is the same municipal corporation as the inhabitants of the town of Boston were. By being incorporated as a city, the identity of the municipal corporation was not lost. Property held by the inhabitants of the town in trust would pass to the city on the same trust. No action of any court was necessary in order to vest the title to such property in the city; and the same duties would rest upon the city as rested upon the town. This was clearly established in *Girard* v. *Philadelphia*,

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7 Wall. 1, where the granting of a new city charter and the repeal of the old one, and the enlargement of the area of the city from two square miles to nearly one hundred and twenty-nine, were held not to affect the city's title to property held in trust, or its capacity to execute the trusts. Again, in *Broughton* v. *Pensacola*, 93 U. S. 266, it was held that rights of creditors were not lost by a change of charter, the court saying, "It will be presumed that the Legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter, and different officers administer its affairs." See also *Mobile* v. *Watson*, 116 U. S. 289; *Shapleigh* v. *San Angelo*, 167 U. S. 646; *Hill* v. *Kahoka*, 35 Fed. Rep. 32; *Devereaux* v. *Brownsville*, 29 Fed. Rep. 742; *State* v. *Natal*, 39 La. An. 439; *Amy* v. *Selma*, 77 Ala. 103; Dillon, Mun. Corp. (4th ed.) §§ 171, 172.

It is however contended by the plaintiffs that, even although the city may hold the title to the fund in trust, and be in that sense a trustee, yet the duties of the persons referred to in the will as managers are such as also to constitute them trustees, with a right of possession and control of the fund. Some of the provisions of the will tend to support this view, but an examination of the whole of the provisions relating to this bequest and to the similar bequest to the city of Philadelphia leads us to the conclusion that the managers were not intended to be trustees. After making detailed provisions in respect to the gift to Boston, Dr. Franklin says: "All the directions herein given respecting the disposition and management of the donation to the inhabitants of Boston I would have observed respecting that to the inhabitants of Philadelphia; only as Philadelphia is incorporated, I request the corporation of that city to undertake the management agreeable to the said directions." The distinction in his mind appears to have been that Philadelphia, being a city, could manage the fund through its existing officers or boards, while the inhabitants of the town of Boston assembled in town meeting could not well pass upon the details of the management, and hence he provides, in the first instance, that the fund "shall be managed under the direction of the selectmen, united with the ministers of the oldest Episcopalian, Congregational, and Presbyterian churches in that town." Afterwards he says that "it is presumed that there

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will always be found in Boston virtuous and benevolent citizens willing to bestow a part of their time in doing good to the rising generation by superintending and managing this institution gratis." A provision follows that "there may in time be more [money] than the occasions in Boston shall require, and then some may be spared to their neighboring or other towns in the said State of Massachusetts who may desire to have it, such towns engaging to pay punctually the interest and the portions of the principal annually to the Inhabitants of the Town of Boston." And still later he adds: "I hope, however, that if the inhabitants of the two cities should not think fit to undertake the execution they will at least accept the offer of these donations as a mark of my good will, a token of my gratitude, and a testimony of my earnest desire to be useful to them even after my departure. I wish, indeed, that they may both undertake to endeavor the execution of the project." There could be no pretence that the corporation of Philadelphia, or any boards of officers of that city, were intended to be trustees, as distinct from the city itself; and we think there was no intention to make the selectmen of Boston, or the three designated ministers, or the virtuous and benevolent citizens who might aid in superintending and managing the fund, or institution as it is called in the codicil, trustees of the property in a legal sense. They are nowhere called trustees. No provision is made for any formal appointment or succession to the title when new persons of the classes described should act as managers. Formerly, on the appointment of a new trustee, a conveyance of the property to him was necessary, but now the vesting of title without such conveyance is often provided for by statute. It may be that the founder of a trust could provide for the succession to the title without a formal conveyance; but the absence of all provision for such succession, or for any formal appointment or ascertainment of the ministers who were expected to serve, and the provision respecting the other persons who might take part in the superintendence and management, tend to negative the idea that any of the persons so designated or referred to were intended to be trustees. The case in this particular is quite different from *Drury* v. *Natick*, 10 Allen, 169, where it was expressly provided that the town should choose five trustees at the first annual

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meeting after the decease of the testatrix, and every fifth year thereafter, who should hold office for the term of five years. In the present case, the duties of the managers, though in some respects like those usually exercised by trustees, are not such as necessarily to imply technical trusteeship. These duties bear some relation to those of visitors of a charity. The managers were probably intended to assist rather than to supplant the inhabitants of the town in the administration of the fund. It is not necessary at this time to define the extent and limits of their authority. It is enough to say that the city of Boston is the trustee, as successor to the inhabitants of the town of Boston, and that there is and has been no vacancy in the office of trustee. The Probate Court assumed to appoint the plaintiffs as trustees on the theory that there was a vacancy. It did not assume to appoint them as managers, and the statutes confer upon that court no jurisdiction to appoint such managers; and the power of a court of equity to appoint such managers, under its general jurisdiction over charities, need not now be considered. The plaintiffs assert no title except under their appointment as trustees, and this title fails. The selectmen and the ministers were never as individuals entitled to the possession and control of the fund, as against the town; nor are the plaintiffs entitled to such possession and control, as against the city.

For these reasons, in the opinion of a majority of the court, the entry must be,

*Petition dismissed.**

* After the decision in this cause an application was filed by the plaintiffs for compensation for their services and expenses. The rescript was modified so as to read as follows: "Petition dismissed, without costs. The application of the plaintiffs to be allowed costs as between solicitor and client out of the fund to be determined by a single justice."

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JAMES H. CALLAHAN, executor, *vs.* MARY E. WOODBRIDGE & another.

Suffolk. March 23, 1898. — August 30, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Tax on Collateral Legacies and Successions — Property in this Commonwealth given by Foreign Will.

Under St. 1891, c. 425, entitled "An Act imposing a tax on collateral legacies and successions," the Probate Court has jurisdiction of a petition by the executor of a foreign will proved in this Commonwealth for instructions upon the question whether he is liable to pay a tax upon the property, real and personal, of the testate found herein.

The executor of a foreign will proved in this Commonwealth is liable to pay a tax under St. 1891, c. 425, entitled "An Act imposing a tax on collateral legacies and successions," upon the following property of the testate within the jurisdiction of this Commonwealth: real estate, cash on hand, bonds of railroad companies, of cities without the Commonwealth, of other States and of the United States, all of which are transferable by delivery, and are commonly bought and sold in the market in this Commonwealth. But whether a note and mortgage, the maker of the note and the land covered by the mortgage not being within the Commonwealth, are taxable, *quære*.

For the purpose of determining whether an estate is taxable under St. 1891, c. 425, entitled "An Act imposing a tax on collateral legacies and successions," the words of the proviso at the end of § 1, which declare that no estate shall be subject to the provisions of the act unless its value, "after the payment of all debts," shall exceed the sum of ten thousand dollars, mean that only the debts, and not the expenses of administration, are to be deducted; but for the purpose of determining on what amount the tax is to be computed, expenses of administration must be deducted.

PETITION, to the Probate Court, by the executor of the will of James A. Winslow, late of Binghamton, in the State of New York, for instructions as to the payment of a collateral inheritance tax. A decree was entered that the residuary estate devised to Mary E. Woodbridge was liable to pay such tax, and Mary E. Woodbridge appealed to this court. The facts appear in the opinion.

F. G. Cook, for Mary E. Woodbridge.

F. T. Hammond, Assistant Attorney General, for the Treasurer of the Commonwealth.

KNOWLTON, J. This is a petition to the Probate Court by the executor of a foreign will proved in this Commonwealth for

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instructions upon the question whether he is liable to pay a tax on a collateral legacy or succession under the St. 1891, c. 425. Section 1 of this chapter is in part as follows: "All property within the jurisdiction of the Commonwealth, and any interest therein, whether belonging to inhabitants of the Commonwealth or not, and whether tangible or intangible, which shall pass by will or by the laws of the Commonwealth regulating intestate succession . . . to any person, in trust or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant, brother, sister, adopted child, the lineal descendant of any adopted child, the wife or widow of a son, or the husband of a daughter of a decedent, . . . shall be subject to a tax of five per centum of its value for the use of the Commonwealth, . . . provided, however, that no estate shall be subject to the provisions of this act unless the value of the same, after the payment of all debts, shall exceed the sum of ten thousand dollars."

The appellant raises the preliminary question whether the Probate Court has jurisdiction over a case of this kind. We are of opinion that it has. Section 14 of this chapter expressly provides that "the Probate Court having jurisdiction of the settlement of the estate of the decedent shall have jurisdiction to hear and determine all questions in relation to said tax that may arise affecting any devise, legacy, or inheritance under this act," etc. The decedent was a non-resident, and these proceedings relate only to the property found in this Commonwealth. So far as this property is concerned, the Probate Court has jurisdiction of the settlement of the estate of the decedent. Pub. Sts. c. 156, § 2; c. 127, §§ 15, 16, 17; c. 138, §§ 1 and 2. Under the express provisions of the section last cited, it may regulate the settlement of the estate, not only in regard to the collection of assets and the payment of debts, but it may afterwards make final distribution of the property, or pay it over according to the will, or may, in its discretion, cause it to be transmitted to the executor or administrator, if any, in any State or country where the deceased had his domicil. *Welch* v. *Adams*, 152 Mass. 74. The question as to the liability to pay a tax is a question affecting a devise, legacy, or inheritance under the act, for if the tax is paid, the devise, legacy, or inheritance will be diminished by the payment. It seems clear that the case is within St. 1891,

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c. 425, § 14, and we have no occasion to inquire whether the Probate Court has jurisdiction under other statutes. *Essex* v. *Brooks*, 164 Mass. 79. See St. 1891, c. 415; *Swasey* v. *Jaques*, 144 Mass. 135.

The constitutional authority of the Legislature to lay an excise tax upon the privilege of succession to property after the death of the former owner of it was established by this court in *Minot* v. *Winthrop*, 162 Mass. 113, and is generally recognized by courts elsewhere. *Attorney General* v. *Bouwens*, 4 M. & W. 171. *Stern* v. *The Queen*, [1896] 1 Q. B. 211. *Thomson* v. *Advocate General*, 12 Cl. & F. 1. *State* v. *Dalrymple*, 70 Md. 294. *In re Romaine*, 127 N. Y. 80. *In re Swift*, 137 N. Y. 77, 84. *Orcutt's appeal*, 97 Penn. St. 179. *Small's estate*, 151 Penn. St. 1. *Alvany* v. *Powell*, 2 Jones, Eq. 51. The legal right of the Legislature to make such a provision in regard to the property of a non-resident owner rests upon the fact that the property is within the State and subject to its jurisdiction. This power is as large in reference to the property of a non-resident decedent as in reference to that of the inhabitants of the Commonwealth. It covers the property within the jurisdiction. A ground for its exercise is that the property has the protection of our laws, and that our laws are invoked for the administration of it when a change of ownership is to be effected.

In the statute before us the succession to property of non-residents is expressly taxed as if the property belonged to inhabitants of the Commonwealth. The language "which shall pass by will or by the laws of the Commonwealth regulating intestate succession," taken in connection with the clauses immediately preceding it, applies to foreign wills, and to property that passes under the statute of this Commonwealth which regulates the succession to the property of a non-resident owner after his death, and declares that it shall be "disposed of according to the laws of the State or country of which he was an inhabitant." Pub. Sts. c. 138, § 1.

Upon the facts before us there is no doubt that all the property referred to was within the jurisdiction of this Commonwealth, so as to come within the statute, unless it be the note with mortgage security upon land in Kansas City. There was real estate in Boston, there was a small amount of cash on

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hand, and the rest of the property was in bonds of railroad companies, of the city of Zanesville, Ohio, of the State of New Hampshire, and of the United States, all of which were completely transferable by delivery, and were commonly bought and sold in the market in this Commonwealth. The statute applies to property "tangible or intangible." Without any provision in regard to intangible property, the property above described would be included, because it was all tangible, passing from hand to hand, and was as completely within the jurisdiction of our laws as ordinary chattels. Much discussion has been had in other courts under statutes somewhat like ours, in regard to stocks, bonds, promissory notes, and other similar property. The Court of Appeals in New York, in a very recent case, held that stocks in local corporations, and negotiable bonds found within the State, belonging to the estate of a non-resident decedent, are subject to a succession tax. *In re Morgan*, 150 N. Y. 35. *In re Houdayer*, 150 N. Y. 37. The same doctrine is held in well considered cases in Maryland and North Carolina. *State* v. *Dalrymple*, 70 Md. 294. *Alvany* v. *Powell*, 2 Jones, Eq. 51. It has been held that the statute in Pennsylvania was "intended to embrace only personal property of a tangible nature, actually situated or used for business purposes within the Commonwealth, and not to mere certificates of indebtedness, such as government bonds, whose *situs* necessarily follows the owner's domicil." *Orcutt's appeal*, 97 Penn. St. 179, 186. In England it has been decided that succession duties under the St. 16 & 17 Vict. c. 51, are not payable on legacies of personal property in England, given by the will of a testator domiciled abroad. *Wallace* v. *Attorney General*, L. R. 1 Ch. 1. In this decision the court followed and applied the rule stated in *Thomson* v. *Advocate General*, 12 Cl. & F. 1, in regard to duties on legacies under the St. of 36 Geo. III. c. 52. But probate duties under the St. of 55 Geo. III. c. 184, are payable upon property belonging to estates of non-resident decedents like that in the case before us. *Fernandes's case*, L. R. 5 Ch. 314. *Attorney General* v. *Bouwens*, 4 M. & W. 171.

The language of our statute is too clear to admit of a doubt that such property as that to which we have referred was intended to be covered by it.

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Whether the note and mortgage were property within the jurisdiction of the Commonwealth is a different question, which, upon the facts stated, it is not necessary to decide. We understand that the maker of the note, as well as the land covered by the mortgage, was not within the Commonwealth. Assuming that the note and mortgage were not property within this jurisdiction, the proceeds of them will be applicable to the payment of the debts and charges of administration, which, as we understand the facts, will be more than enough to absorb them.

It is agreed that the value of the estate after the payment of all debts will exceed the sum of $10,000, thus taking the estate out of the proviso at the end of § 1. It is also agreed that the executor would testify, if his testimony is admissible without more, that, in his judgment, after the payment of all debts against the estate and expenses of administration, both in Massachusetts and in New York, the value of the estate will be less than $10,000. If this testimony is taken as true and is well founded, it raises the question whether the expenses of administration as well as the debts are to be deducted in order to determine whether the value of the estate exceeds $10,000, so as to subject the succession to taxation. This question is by no means free from difficulty. There is much force in the argument that it is only when the estate passing to a successor exceeds $10,000 that the statute applies. On the other hand, in most of our statutes where expenses of administration are to be added to debts to determine an amount, or for purposes of deduction, it is expressly so stated. It is expected that taxes under this statute will be paid without waiting a long time for the settlement of controversies and the conclusion of litigation. The expenses of administration cannot be determined until the administration is nearly or quite completed. It is provided by § 12 of the statute that, if it is determined that the whole or a part of the tax paid ought not to have been paid, it shall be refunded. We are of the opinion that it is the better construction of the statute to hold that, for the purpose of determining whether the estate is taxable, the language is to be strictly followed, and that only the debts are to be deducted. Of course, for the purpose of determining on what amount the tax is to be computed, expenses of administration must be deducted, as the

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tax is to be paid only on the amount which passes to the successor or successors. Except as to the note and mortgage, the order will be, *Decree affirmed.*

171 600
183 461

171 600
189 389

171 600
190 287

171 600
197 27

JAMES H. BENNETT & another *vs.* EDWARD H. SWEET & others.

Suffolk. March 25, 1898. — August 30, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Equity — Creditors' Bill to reach and apply a Verdict for Personal Injuries before Judgment.

A verdict for personal injuries before judgment has been entered upon it is not property which can be reached in equity.

BILL IN EQUITY, under Pub. Sts. c. 151, § 2, cl. 11, and St. 1884, c. 285, to reach and apply in payment of a debt a verdict for personal injuries before judgment has been entered upon it. The defendant Sweet, who was an inhabitant of Rhode Island and who was not served with process within this Commonwealth, appeared specially by attorney and filed a motion to dismiss the bill, and also a plea to the jurisdiction. The plaintiffs traversed the plea, and, after a hearing on evidence, the Superior Court entered a decree dismissing the bill, with costs; and the plaintiffs appealed to this court. The facts appear in the opinion.

The case was argued at the bar in March, 1898, and afterwards was submitted on briefs to all the justices.

H. R. Bailey, (*S. L. Whipple & W. R. Sears* with him,) for the plaintiffs.

F. Hutchinson, for Sweet.

FIELD, C. J. It appears that Sweet brought an action of tort against one Kimball and obtained a verdict, but that no judgment has been entered on the verdict, although by a rescript from this court the Superior Court could enter judgment. The Superior Court has continued the case for judgment, and it remains so continued. See *Sweet* v. *Kimball*, 166 Mass. 332. The cause of action there alleged was that Kimball had procured

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the arrest of Sweet without right, and forced him to pay a sum of money for his release. The present suit is a bill in equity brought by the partnership of Bennett, Rand, and Company against Sweet and his attorneys in Massachusetts, and against Kimball to obtain the payment of a debt due to the partnership from Sweet, and it seeks to reach and apply the verdict in the action of *Sweet* v. *Kimball* in satisfaction of this debt. Sweet is an inhabitant of Rhode Island, and has not been served with process within this Commonwealth, but he has appeared specially by attorney, and has filed a motion to dismiss the bill, and also a plea to the jurisdiction. The plaintiffs traversed the plea, and, after a hearing on evidence, the Superior Court dismissed the bill with costs. The question of law which the case presents is whether the verdict in the action of Sweet against Kimball can be reached and applied in equity, in satisfaction of the debt due from Sweet to the plaintiffs. We think that the gist of the cause of action in *Sweet* v. *Kimball* was an injury to the person, although by means of that injury Sweet was deprived of property. If one count of the declaration in that action could be regarded as a count to recover money paid to the defendant in that action under duress, yet we understand that the verdict was general upon both counts, and was not confined to the amount of money paid. A verdict in such a case before judgment is not assignable; *Linton* v. *Hurley*, 104 Mass. 353; *Rice* v. *Stone*, 1 Allen, 566; and it cannot be reached by trustee process; *Thayer* v. *Southwick*, 8 Gray, 229; and we are of opinion, for the reasons given in these cases, that a verdict for personal injuries before judgment has been entered upon it is not property which can be reached in equity. A verdict in favor of a plaintiff for a definite sum of money, if it could be reached at all by a creditor of the plaintiff, is of such a nature that it could be reached by trustee process. *Decree affirmed.*

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2. Money paid by A. to B. in transactions which are found to be wagers upon the future market price of certain stocks, none of which were, or were intended to be, bought, sold, or delivered, and money received by B. as the proceeds of the transactions when closed out by A.'s orders cannot be recovered in an action by A. against B.; and the fact that B. was doing a commission business for C., who was a stockbroker, is immaterial. *Northrup* v. *Buffington*, 468.
3. A railroad company, pursuant to St. 1874, c. 372, § 57, (Pub. Sts. c. 112, § 80,) gave its negotiable promissory note to a connecting railroad company, secured by a mortgage on its property and franchises, made to two persons as trustees for the promisee, containing a power to the mortgagees to sell the property and franchises at auction for a breach of the condition of the mortgage. Subsequently, the mortgagees and the promisee entered into an agreement with A., a natural person, that upon certain payments made by him from time to time they would transfer the note and assign the mortgage to him, and until the final payment they should hold the note and mortgage and enforce the same for his benefit. A., after making two partial payments under the agreement, became insolvent, and his assignee in insolvency brought an action against the original promisee to recover back the money paid to it. *Held*, that the action could not be maintained. *Chadwick* v. *Old Colony Railroad*, 239.

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4. An ordinance of the city of Boston which provides that "No person shall, in or upon any of the public grounds, walk, stand, or lie on the grass, or coast or engage in a game of ball, football, or other athletic sport," is a bar to recovery for personal injuries occasioned to a person who, while walking across the grass on the Public Garden, and being aware that the public were warned by signs to keep off of it, falls into a deep unguarded trench which had been dug by the city for the laying of water pipes. *Sheehan* v. *Boston*, 296.

5. Where a defendant, the lessee of a building, defends against some negligence of his own, or of some person for whom he is made liable by the employers' liability act, St. 1887, c. 270, and damages are assessed with reference to the degree of culpability of himself or of such person, he has not a right of action against his lessor to recover the amount of the judgment, but the lessor, if liable at all to him, is liable at common law for the breach of his contract or of his duty. *Consolidated Hand-Method Lasting Machine Co.* v. *Bradley*, 127.

6. An action cannot be maintained for personal injuries occasioned to a boy nearly thirteen years of age who rides a bicycle headlong into a train without taking any precaution, his mind at the time being full of something else, and there being nothing to excuse him for not looking if he could see, or for not getting off his wheel and advancing cautiously if he could not see. *Sewell* v. *New York, New Haven, & Hartford Railroad*, 302.

7. An action against a street railway company, under St. 1886, c. 140, to recover damages for the death of the plaintiff's intestate, a boy eight years and one month old, whose life is alleged to have been lost by reason of the gross negligence of the motorman, while the boy himself was in the exercise of due care, cannot be maintained, if it appears that the car could be seen for a considerable distance as it was approaching, and its sound could be plainly heard; that the boy's view was unobstructed; that the railway had but a single track, and the distance from the curbstone of the narrow sidewalk to the nearest rail was only about twelve feet; and that he ran rapidly from the walk to the track in front of the car, and no reason or excuse was disclosed for his so doing. *Morey* v. *Gloucester Street Railway*, 164.

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ADOPTION.

1. A request for a ruling that "it is not competent under the adoption law for a person in the senile age of life to adopt persons in the prime and vigor of life" is rightly refused. *Collamore* v. *Learned*, 99.
2. At the trial of petitions to set aside decrees of adoption, the petitioners requested a ruling that "it is not competent under the adoption law for an adoption to be made for the purpose of operating simply as and to take the place of a last will and testament." The judge found that the adoption was not made for the purpose of so operating, but that it was an important purpose of the adopter to make the adopted persons his heirs at law with a view to take away any inducement that some of those who otherwise would have been his heirs might have to oppose his will. *Held*, that this motive was a proper one, and, if it were bad, it would not affect the validity of the decree, as the ruling asked seemed to suppose, however much it might affect the discretion of the court in making it, if put in evidence at the original trial. *Held*, *also*, that the same consideration would apply to the other rulings asked that the authority of the court could not be used to inflict private revenge or other object relating to third persons, to foster immorality, or to prevent the heirs at law from contesting a will, and that in view of the number of persons sought to be adopted, etc., and of the motives of those interested and of the facts surrounding the family, the decrees were invalid, even if they had not been disposed of by the judge's finding that the facts supposed were not true. *Ibid.*

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1. If requests for rulings are in the alternative, and a decree is entered in accordance with one of them, and both parties appeal therefrom, upon a report of the case, all questions of law are open. *Kendall* v. *Equitable Life Assurance Society*, 568.
2. All the considerations in favor of holding that an appeal may be taken from a judgment of the Municipal Court of Boston dismissing a petition to have a judgment vacated under Sts. 1893, c. 396, and 1894, c. 431, are

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equally applicable to cases under St. 1895, c. 234, relative to vacating judgments and writs of and petitions for review. *Clarke* v. *Bacall*, 292.

3. On a petition, on appeal, from the Municipal Court of Boston to have a judgment vacated, it is error for the Superior Court to order a writ of review to be issued instead of ordering the judgment to be vacated. *Ibid.*

4. A railroad company which was, pursuant to St. 1874, c. 372, § 57, (Pub. Sts. c. 112, § 80,) the holder of a mortgage of the property and franchises of another railroad company, entered into an agreement with A., a natural person, upon the payment of a certain sum by him, to assign and transfer to him the mortgage and the note secured thereby. A., having paid a portion of the sum, became insolvent, and upon the petition of the mortgagee the Court of Insolvency directed a sale of the mortgaged property and franchises, and authorized the mortgagee to prove its claim as a creditor for any balance of the debt, and the assignee appealed to the Superior Court, and, on the affirmation of the decree, to this court. *Held*, that the proper remedy was by an application to this court under Pub. Sts. c. 157, § 15; that the Superior Court had no jurisdiction, and that the appeal should be dismissed. *Chadwick* v. *Old Colony Railroad*, 239.

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See FALSE RETURN; OFFICER.

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See BENEFICIARY ASSOCIATION; ENCUMBRANCE; MUTUAL INSURANCE, 2; SEWER.

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See RECEIVER, 4.

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See ACTION, 3; CONVERSION; FRAUDULENT CONVEYANCE.

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ASSIGNMENT.

1. Where a policy of insurance provides that, if the assured is alive on a certain day, and the policy has not been terminated by lapse or his death, he has the option, first, to withdraw in cash the policy's entire share of the assets of the company, and also the surplus apportioned by the company, or, secondly, to convert the same into a paid up policy, and the assured and his wife, who is the beneficiary, assign absolutely their interest in the policy, guaranteeing the sufficiency of the assignment as security for the payment of a debt evidenced by a promissory note given by him, which is afterwards renewed without her knowledge, the contract of the wife is not one of suretyship; and although the guaranty contained in the assignment may have been lost by the giving of time, it does not affect the legal consequences of the assignment. *Kendall* v. *Equitable Life Assurance Society*, 568.
2. A. borrowed $1,900 of B., and gave his promissory note therefor payable in six months from date, with interest after maturity at the rate of two per cent a month, and A. and his wife, who was the beneficiary, assigned to B. their interest in a policy of insurance on A.'s life. Upon A.'s failure to pay the premiums on the policy, they were paid by B. The note was not paid at maturity, and A. gave B. a new note for the amount of the first note and interest, and the amount of the premiums paid by B., with interest at the rate of two per cent a month, reciting the assignment of the policy as collateral security therefor. After A.'s death, his wife brought a bill in equity to redeem the policy, and the judge found that she never consented that the policy should be pledged to B. as security for any debt other than "the note of $1,900 and interest thereon"; and that she had no knowledge or notice that B. claimed to hold the policy as security for any debt other than the "original debt of $1,900 and interest thereon" until after her husband's death, and did not authorize him to pledge it for any other debt. *Held*, that the finding was to be construed as a finding that the plaintiff pledged her interest in the policy as security for the original debt, and not for the original note. *Ibid.*
3. The fact that an assignment by a husband and wife of their interest in a policy of insurance is absolute in form is immaterial, and the consideration and purpose of the transaction may be shown by oral evidence. *Ibid.*
4. If a policy of insurance is pledged as security for the debt of the assured, and the pledgee pays the premiums in order to keep the policy alive, the beneficiary, who joined with the assured in pledging the policy, is entitled to redeem the policy only upon paying, in addition to the amount of the debt with interest thereon, the amount of the premiums paid by the pledgee, with interest from the time of each payment. *Ibid.*

See BANK, 2; DURESS, 1; FRAUDULENT CONVEYANCE; INVENTION, 1, 8; TRUSTEE PROCESS.

ATTACHMENT.

See CONTRACT, 4; EQUITY, 1; EVIDENCE, 10; TRUSTEE PROCESS.

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ATTORNEY AT LAW.

In an action of contract for breach of an agreement by an attorney at law to preserve the plaintiff's rights in reference to the taking of a strip of land by the town of Framingham, acting under St. 1887, c. 403, for the construction of a sewer, it appeared that the town accepted the act in 1888; that thereafter it complied with § 2 of the act, and laid a sewer through the plaintiff's land, which it completed in the summer of 1889, without any formal taking of the land; that in September, 1889, the plaintiff employed the defendant's intestate, who accepted a retainer and brought an action of trespass against the town for the unlawful entry; that on November 17, 1890, the town voted that the town take and seize, under the provisions of chapter 403 of the Acts of 1887, "All such land . . . in the towns of Framingham and Natick as are, in the judgment of the selectmen, necessary for its system of sewage disposal and connections therewith; and that the selectmen be a committee, with full power, to do all and singular, any and all acts and things necessary for such taking and seizure, with authority to employ counsel and incur all necessary expenses"; that on December 6, 1890, the selectmen recorded in the registry of deeds a description of a strip of the plaintiff's land, which taking purported to be by the town acting by its selectmen; that the defendant's intestate was soon afterwards notified of this taking, and he then agreed to protect the plaintiff's rights with reference thereto; that he neglected, without notifying the plaintiff thereof, for more than two years after the taking, which was the limit within which such petition could be filed, to file any petition for an assessment of damages to the plaintiff caused by the taking; that no such petition was brought by the plaintiff before beginning this suit; and that in 1896 the plaintiff compromised his action of trespass against the town and released to the town the land in question, stipulating in connection with the compromise and release that his rights against the defendant should not thereby be affected. *Held*, that there was a valid taking of the plaintiff's land which gave him a right to recover; that there was evidence that the plaintiff suffered damage from the neglect of the defendant's intestate; and that the defendant had no right of subrogation, and the release to the town was not a bar to the plaintiff's claim. *Drury* v. *Butler*, 171.

See PARTNERSHIP, 1.

AUDITOR.

1. An auditor's report in favor of the plaintiff is enough to warrant a finding of the judge for the plaintiff, and his refusal to give rulings requested by the defendant, unless the findings in the report or the other facts stated are necessarily inconsistent with the refusal and the result. *Quin* v. *Bay State Distilling Co.* 283.
2. The report of an auditor, in an action to recover compensation for the use of inventions, stated that he ruled that the plaintiff was entitled to recover reasonable compensation. He had been asked to rule, as matter

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of law, that the plaintiff could not recover any compensation for the use of his inventions while he was in the defendant's employ. *Held*, that the ruling was to be taken to mean that the plaintiff was not debarred from recovery on the ground stated; and that, if it meant more than that, it must be treated as a finding of fact, or as a statement that the plaintiff was entitled to recover provided the facts reported would warrant it. *Burton* v. *Burton Stock Car Co.* 437.

See CONTRACT, 2; MUTUAL INSURANCE, 2.

AWARD.

See ARBITRAMENT AND AWARD.

BANK.

1. The direct legal liability of a bank for money deposited subject to withdrawal by check is only to the depositor. *Gregory* v. *Merchant's National Bank*, 67.
2. To an action against a bank to recover a sum deposited with it, with a count for refusing to honor a check for the same amount which has been paid to a holder under a forged indorsement and payment refused under a true indorsement made later after the discovery of the forgery, it is no defence that the nominal plaintiff's debt to the payee has been satisfied, either by the check or by the subsequent assignment of the cause of action to the payee, who sues in the name of the depositor, and that the latter has suffered only nominal damages. *Winslow* v. *Everett National Bank*, 534.

See EQUITY, 6, 7.

BANKRUPTCY.

The intentional omission by a bankrupt of the name of the holder of his promissory note from the schedule of his creditors in proceedings in bankruptcy under U. S. Rev. Sts. §§ 4972–5132, and the payment during the proceedings of money on account of the note by the bankrupt to the creditor, who was ignorant of those proceedings prior to beginning an action on the note, do not prevent the bankrupt from setting up his discharge in bankruptcy as a bar. The payment did not constitute a new promise in writing within Pub. Sts. c. 78, § 8, and the fact that it may have been made with fraudulent intent does not avoid the discharge. *Heim* v. *Chapman*, 347.

BENEFICIARY ASSOCIATION.

In each of the policies issued after January 11, 1892, by a beneficiary association incorporated under general law, was the following: "In the event of said member becoming totally and permanently disabled, and the determining of such disability by the medical director and board of directors

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of said association, there shall be paid to said member at the option of said board, if he shall so request in writing at any time while this policy is in full force, upon the surrender to said association of this policy and the cancellation of the same in full discharge and settlement of all claims under this contract, the sum of $." The amount written in the blank space was one half the amount of the total policy risk. Numerous proofs were filed with the receivers by policy holders as claimants for permanent and total disability prior to the filing of the bill for the appointment of receivers. In most of these cases the alleged disability arose from sickness, and in none of them did the directors vote or determine to exercise their option in favor of the payment or allowance of the claim. *Held*, that the corporation had no power, since the enactment of St. 1890, c. 421, to engage in the business of insurance against losses in cases where the disability might arise from sickness, that the claimants had no additional right by reason of disability to share in the assets of the corporation, and that the same answers applied to a claim of an intervening petitioner, which arose upon an agreement of the defendant to assume the liability of another association under a certificate issued to the claimant containing a provision similar to the above but different from it in making the liability to pay upon demand in cases of total disability absolute instead of optional with the director. *Attorney General* v. *Bay State Beneficiary Association*, 455.

BOND.

The sureties on the first bond of a guardian are not discharged by the filing of a second voluntary bond. *Forbes* v. *Harrington*, 386.

See FORECLOSURE; TAX, 3; TRUST AND TRUSTEE, 9.

BOSTON.

See ACTION, 4; APPEAL, 2, 3; DISCONTINUANCE; EMPLOYERS' LIABILITY ACT, 2; TRUST AND TRUSTEE, 6.

BROKER.

A broker is not entitled to a commission for services in giving information which enables his principal to find a customer, where he is in no way instrumental in bringing his principal and the customer together, and all that he does is tardily to give to the principal a part of the information which the principal has already received from other sources; and the fact that the principal in sending his estimates of prices of his goods to a number of general contractors also sends a copy to the broker, which is accompanied by a letter, stating that he includes one per cent commission in the figures for him, and the fact that the broker afterwards does nothing further to earn his commission, are to be interpreted as an offer for the future, and not an admission of existing liability. *Houghton* v. *Milford Pink Granite Co.* 354.

See INSURANCE, 3.

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BUILDINGS.

See CONTRACT, 2; EMINENT DOMAIN, 1; INSURANCE, 1; LEASE, 1, 2; MORTGAGE; NEGLIGENCE, 12–14; RESTRICTION.

BURDEN OF PROOF.

See DAMAGES, 1; NEGLIGENCE, 4; PROMISSORY NOTE.

CARRIER.

See CONFLICT OF LAWS.

CASUALTY INSURANCE.

See BENEFICIARY ASSOCIATION.

CERTIFICATE.

See MECHANIC'S LIEN, 3.

CERTIORARI.

See MILITIA.

CHECK.

1. The holder of an unindorsed check, payable to his own order, is under no legal obligation to the drawer to exercise care as to how the check shall be kept, or to whom he shall commit its custody, or to see to it that the check shall not be put in circulation by the forgery of his indorsement, so long as he acts honestly without collusion; and he is not deprived of his remedy against the drawer by merely negligently intrusting such a check to a clerk who, due care would have told him, was dishonest, and thus giving the clerk an opportunity to commit crime. *Shepard & Morse Lumber Co.* v. *Eldridge*, 516.
2. The holder of an unindorsed check, payable to his own order, is under no other legal obligations with reference to it than those which rest upon any holder of commercial paper completed and put in circulation by the maker. *Ibid.*
3. If a check is taken by the payee in absolute extinguishment of the drawer's debt to him, that circumstance cannot relieve the drawer from his legal obligations as such; and if the check is stolen from the payee and collected upon a forged indorsement, that does not furnish a sufficient reason why the loss should remain upon the payee rather than fall upon the drawer. *Ibid.*
4. The fact that the drawer of a check has been in the habit of buying goods of the payee for several years, and of making payment by checks, imposes

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no liability upon the payee as to the methods in which his business shall be conducted, or as to what clerks he shall employ. *Shepard & Morse Lumber Co.* v. *Eldridge*, 516.

5. The payee of a check is not to be charged with the knowledge that it has been stolen or embezzled and collected upon a forged indorsement, either because his clerk, who committed the forgery, had that knowledge, or because the means of knowledge existed in his books of account, so that he would have made the discovery if his monthly trial balances had been made by an honest clerk. *Ibid.*
6. One who has become the holder of a check is under no duty to give notice to the drawer and the drawee, or to the public, as of a lost check, if the check is stolen and collected upon a forged indorsement, and he remains honestly ignorant of those facts, and incorrectly, but honestly, assumes that it has been collected in the regular course of his business; nor is there a duty to any one connected with the check which requires him to examine his books of account, or to make trial balances, or to discover by any means what has become of the check; and he is not to be charged with knowledge which he did not in fact have. *Ibid.*
7. If an employer, after he has been told that his clerk has been depositing in a certain bank to his own credit checks payable to the employer, asks and receives from the clerk a check on that bank for the amount of a bill due from him to the employer for goods, which check is paid by the bank, and also consents that another check drawn by the clerk upon that bank may be paid and charged against the clerk's deposit therein, this does not work an actual or implied ratification of the clerk's acts in indorsing the checks with his employer's name or in collecting them. *Ibid.*
8. The receipting of bills by the seller of goods without informing the buyer that a prior debt for which a check was given had not been extinguished, if not done with intent to mislead him, will not justify the buyer in inferring that the check has been collected by the seller so as to estop him, in an action to recover the amount of the check, from showing that it had been stolen by his clerk and collected upon a forged indorsement. *Ibid.*
9. The payee of a check who, the check having been stolen from him, put in circulation by forgery, and paid by the drawee, misleads the drawer to his prejudice, and thereby places him in a worse position than he would otherwise be in with reference to the assertion or protection of his rights resulting from what has been done with the check, is estopped from maintaining an action against the drawer upon the check. *Ibid.*

See BANK; EVIDENCE, 13.

CIRCUIT COURT OF THE UNITED STATES.

See EQUITY, 7.

CITY.

If the water commissioners of a city, in digging a trench for the purpose of laying pipes to supply the inhabitants with water, act as agents of the city,

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and are negligent in not sufficiently lighting the excavation and in not maintaining proper barriers to keep travellers from walking into it, the city is liable for injuries caused by such negligence. *Fox* v. *Chelsea*, 297.

See ACTION, 4; DAMAGES, 1; DEED, 6, 7; FRAUDS, STATUTE OF, 3; NEGLIGENCE, 5–8; TRUST AND TRUSTEE, 6; WRIT OF ENTRY, 1, 3.

COLLATERAL LEGACIES AND SUCCESSIONS.

See TAX.

COLLATERAL SECURITY.

See ASSIGNMENT 2–4; SALE.

COMMISSIONERS.

See ARBITRAMENT AND AWARD.

COMMISSIONS.

See BROKER; PARTNERSHIP, 3.

CONDITION.

1. Under the provision in a policy of insurance against loss by fire, in the Massachusetts standard form, that, if the parties fail to agree as to the amount of the loss, it is mutually agreed that the question shall be referred to arbitrators to be chosen, whose decision shall be final, "and such reference, unless waived by the parties, shall be a condition precedent to any right of action" to recover for the loss, such agreement to refer the loss to arbitration is a condition precedent to the right of the assured to bring an action upon the policy. *Lamson Consolidated Store Service Co.* v. *Prudential Fire Ins. Co.* 433.
2. After a loss by fire of property insured by a policy in the Massachusetts standard form, the assured sent proofs of loss to the insurance company, which wrote to him for further information in regard to certain matters, using this language: "Please understand we do not intend by anything herein said to make any admission of legal liability, reserving the settlement of that question until after we shall have obtained further information." The assured furnished the information required. Subsequently other information was asked for and furnished, and finally the assured, in reply to a letter from the company asking for still further information, stated that certain proofs which had been furnished were correct, and requested the company to inform him at an early date "regarding your intention to pay said claims." No reply was made to this, and the assured, after waiting nearly a year, brought an action on the policy.

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There was evidence tending to show that, in conversations between the representatives of the parties, the company denied its liability and never suggested that the loss should be submitted to arbitration. *Held*, that there was evidence of a waiver by the defendant of the condition in the policy in regard to arbitration which should have been submitted to the jury. *Lamson Consolidated Store Service Co.* v. *Prudential Fire Ins. Co.* 433.

See DECLARATION, 1, 2; DEED, 4, 6, 7; NOTICE, 2; RESTRICTION; WAY; WRIT OF ENTRY.

CONFESSION.

See EVIDENCE, 9.

CONFLICT OF LAWS.

1. The general rule that contracts are to be governed as to their nature, validity, and interpretation by the law of the place where they are made, unless it clearly appears that the contracting parties had some other law in view, is applicable to contracts of common carriers for the transportation of merchandise. *Brockway* v. *American Express Co.* 158.
2. At the trial of an action against an express company for negligence in the transportation of the plaintiff's horses from a point in the State of I., through several other States, to a point in this Commonwealth, there was evidence that the contract was made in the State of I., on a printed blank form in general use by the defendant, and in terms exempted the defendant from liability arising "from any fault, negligence, or carelessness, gross or otherwise, on the part of said company, its agents or servants." On the back of this contract was another one for the transportation of a custodian of the horses, containing a stipulation that "any question arising under this contract shall be determined by the law of the State of N.," in which State the alleged act of negligence occurred. *Held*, that these were separate contracts, and the stipulation of the second above quoted did not apply to the first, or indicate an intention that it should be governed by the law of N.; that evidence of the validity under the law of the State of N. of the provisions of the first contract exempting the defendant from liability, was properly excluded; and that the first contract was governed by the *lex loci contractus*. *Ibid.*

See INSURANCE, 4; TRUSTEE PROCESS.

CONSIDERATION.

See ASSIGNMENT, 8; GUARANTY, 1; INVENTION, 1; MORTGAGE.

CONSTABLE.

See GRAND JURY, 8.

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CONSTITUTIONAL LAW.

1. The contention that a widening of a way is not included within the meaning of the words "alteration . . . in . . . the location of . . . the highway or town way," in Pub. Sts. c. 112, § 129, or of the words "that the location . . . of the highway or town way shall be changed," in § 130, so that the statute does not authorize an alteration of the crossing to be effected by widening the way at the crossing, or, if it does authorize such a widening, that it does not provide compensation for land taken for a widening, and is unconstitutional, is unsound, and cannot avail. *New England Railroad* v. *Board of Railroad Commissioners*, 135.
2. Section 5 of the St. of 1890, c. 428, is not unconstitutional because it does not provide for notice to the owner of land taken by a railroad corporation. The statute makes ample provision for notice, and no other notice is necessary. *Gately* v. *Old Colony Railroad*, 494.

CONTINGENT INTERESTS.

See LIFE ESTATE.

CONTINUANCE.

See ESTOPPEL, 2.

CONTRACT.

I. *Making.*

1. At the trial of an action to recover for services as a dentist rendered to the minor son of the defendant, it appeared that the son, who was a boy nineteen or twenty years of age and lived in his father's family, went to the plaintiff while suffering from a toothache and had his teeth filled. After the services were rendered he told the plaintiff to make the charge to his father. There was evidence that twice during the lifetime of the minor the plaintiff sent a statement of his charge for the services to the defendant, and received no reply. Once a statement was sent by mail, postage paid, with a request printed on the corner of the envelope to return to the plaintiff if not called for within five days, and this letter did not come back to the plaintiff. The jury returned a verdict for the plaintiff. *Held*, that the defendant had no ground of exception to the refusal of the judge to rule "that upon all the evidence the plaintiff was not entitled to recover." *Lamson* v. *Varnum*, 237.

See BANK, 1; BROKER; CONTRACT, 4; FRAUDS, STATUTE OF, 2, 3; GUARANTY, 2; INSURANCE, 4, 5.

II. *Consideration.*

See ASSIGNMENT, 3; GUARANTY, 1; INVENTION, 1; MORTGAGE.

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III. *Validity.*

See ACTION, 1, 2; CONFLICT OF LAWS; FRAUDS, STATUTE OF, 2–4; PARTNERSHIP, 3; QUANTUM MERUIT; RESTRAINT OF TRADE; TRUST AND TRUSTEE, 8.

IV. *Construction.*

2. A contract between A. and B., by which A. is to furnish labor and materials and superintend work in the erection and repair of buildings for B. so long as both parties shall see fit to continue the arrangement, A. being at no time under a contract to erect a particular building and B. being at no time bound by contract to permit him to complete a particular building, is terminable by either of them at pleasure, and A., having elected to terminate it, may immediately maintain an action upon an account annexed for that which is due him, including merchandise which he has bought and furnished, but has not paid for, with interest from the date of the writ; and the contention that he cannot recover for his services because he failed to render a true account is disposed of by the finding of an auditor that he was not bound by his contract to do any more than he did. *Quin* v. *Bay State Distilling Co.* 283.

3. On March 27, 1891, A. entered into a written agreement with the B. Co. by which it was to construct for him a certain loom to be approved by C., and on such approval the company was to construct thirty-six more looms at a price to be determined. The agreement then proceeded: "The said B. Co. cannot build said loom . . . for other parties excepting as hereinafter provided. On or before the expiration of five years from this date, said A. shall formally notify said B. Co. of their intention to order to be built a second instalment of thirty-six or more of said looms on or before seven years from this date, and when so ordered, said B. Co. shall not build said looms . . . for any other party for a period of ten years from this date. But in case said A. fail to formally notify said B. Co. on or before the expiration of said five years, said B. Co. shall have the privilege of building said looms . . . for other parties after five years from this date, and shall then be released wholly from the obligations of said ten year term; also said A. shall be released from their obligation to order said second instalment of thirty-six or more said looms." On November 9, 1891, A. entered into a written agreement with C. to form a corporation and to employ C. therein, and to give him in the event of his dismissal certain royalties "to the full end of the term of the agreement made by and between the parties of the first part (A)" and the B. Co. *Held*, in an action by C. against A. and the corporation on his dismissal in 1894, no notice having been given by A. to the B. Co. of an intention to order a second instalment of looms and no instalment having ever in fact been ordered, that the term continued until March 27, 1901, and that parol evidence to show that the parties had a different intention was incompetent. *Poole* v. *Massachusetts Mohair Plush Co.* 49.

See BENEFICIARY ASSOCIATION; CONDITION, 1; CONFLICT OF LAWS; GUARANTY, 1, 3, 4; INSURANCE, 7; LEASE; SHIPS AND SHIPPING; TRUST AND TRUSTEE, 2; WAIVER, 1.

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V. *Performance and Breach.*

4. At the trial of an action to recover damages for breach of an agreement to pay the plaintiffs' debts and relieve their property from attachment, there was evidence tending to show that the plaintiffs, who were copartners and owing $2,400 which they were unable to pay, had a stock in trade subject to a mortgage and under attachment; that most of their creditors were willing to release them from their debts upon receiving 33⅓ per cent of their claims; that, a disagreement having arisen between the plaintiffs, friends were called in, including the defendant, who arranged in writing a plan of settlement which stipulated certain things that the plaintiffs and the defendant respectively should do, and which was assented to by the plaintiffs and signed both by them and by the defendant; that thereupon the defendant orally agreed to furnish $800 for settlement with the plaintiffs' creditors and $100 for expenses, in return for which he was, upon the release of the attachments, to have possession of the plaintiffs' stock of goods until he should be reimbursed the sum of $900 and be paid $100 for his services; that soon after this agreement the defendant gave to the plaintiffs' first attaching creditor his covenant to pay all the plaintiffs' creditors the percentage of their respective claims and the legal expenses, that some weeks later the plaintiffs and the defendant signed an indenture, under seal, in which the plaintiffs were party of the first part, the defendant party of the second part, and the creditors party of the third part, purporting to convey all the plaintiffs' property to the defendant, in trust to reduce it to money, pay preferred claims and distribute the rest ratably among the creditors, and to release the plaintiffs from their debts, but no creditor ever assented to it; that thereafter the defendant, although he furnished no money to pay the plaintiffs' creditors and paid none of their debts, took from the mortgagee an assignment of the mortgage of the plaintiffs' goods, replevied them from the attaching officer, and refused to restore them to the plaintiffs; and that he was not prevented from performing his agreement by reason of the refusal of any creditor to accept the percentage. *Held*, that there was evidence sufficient to justify a finding that the defendant made an oral contract with the plaintiffs; that the terms thereof might be found outside the written plan of settlement; that it was not rescinded by the tripartite indenture; that the fact that the defendant in his replevin suit was adjudged to return the goods to the attaching officer was not a defence to this action and could not be considered in reduction of damages; and that (FIELD, C. J., HOLMES & LATHROP, JJ., dissenting) the plaintiffs were entitled to recover the loss sustained by the failure of the defendant to extinguish their debt of $2,400 at a cost to them of $1,000, but not for his dealings with their goods, possession of which he obtained outside the contract. *Banewur* v. *Levenson*, 1.

See ACTION, 1, 5; ATTORNEY AT LAW; DECLARATION, 1, 2; DEED, 1; MECHANIC'S LIEN, 2, 3; NOTICE, 2.

VI. *Rescission.*

See CONTRACT, 2, 4; INSURANCE, 3.

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CONTRIBUTORY NEGLIGENCE.

See ACTION, 6, 7; EMPLOYERS' LIABILITY ACT, 7; HIGHWAY; MASTER AND SERVANT, 2; NEGLIGENCE, 1, 3–7, 10, 11, 14.

CONVERSION.

At the trial of an action by an assignee in insolvency for the conversion of a quantity of iron belonging to his insolvent, there was evidence tending to show that the iron had been transferred by bills of sale by the insolvent to the defendant to secure advances made by him; that the iron was kept in a yard, under lock and key, at some distance from the insolvent's warehouse; that the key of the yard was kept in the insolvent's office over the desk of his bookkeeper, whom the defendant had appointed his agent to keep possession of the property; that portions of such iron were from time to time released by the defendant to the insolvent for sale by him, which were subsequently made good by him by bills of sale of new iron; and that after the insolvency the defendant took the key of the yard to his office and kept it there. *Held*, that there was no evidence that, prior to the insolvency, possession of the goods was delivered to or retained by the defendant, and that the judge properly directed a verdict for the plaintiff. *Drury* v. *Moors*, 252.

See LANDLORD AND TENANT; PRINCIPAL AND AGENT.

CORPORATION.

A street railway company is a corporation authorized to receive toll within the meaning of Pub. Sts. c. 105, §§ 30–35. *Williams* v. *East Wareham, &c. Street Railway*, 61.

See APPEAL, 4; BENEFICIARY ASSOCIATION; EQUITY, 1; FALSE REPRESENTATIONS; FRAUDS, STATUTE OF, 1; INTERROGATORIES TO ADVERSE PARTY; INVENTION, 3; LEASE, 3; MUTUAL INSURANCE; RECEIVER; TRUST AND TRUSTEE, 9; TRUSTEE PROCESS; WAIVER; WATER COMPANY.

COVENANT.

See ENCUMBRANCE; EVIDENCE, 4; LEASE, 1.

CREDITORS.

See APPEAL, 4; EQUITY, 1–3; ESTATES OF PERSONS DECEASED, 1, 2; ESTOPPEL, 2; FRAUDULENT CONVEYANCE; RECEIVER; TRUST AND TRUSTEE, 8; TRUSTEE PROCESS.

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CRIMINAL LAW.

See EVIDENCE, 7–9; GRAND JURY.

DAMAGES.

1. In an action for personal injuries occasioned to the plaintiff by reason of an alleged defect in a highway in the defendant city, it is not injured by a refusal to rule that the plaintiff has not made out his case because he has offered no evidence of the State valuation of the defendant, as referred to in Pub. Sts. c. 52, § 20, and to a statement that it was fair for the jury to assume in the absence of evidence that one fifth of one per cent of the valuation would amount to more than four thousand dollars. Apart from the burden of proving a valuation which would cut down its liability below four thousand dollars, which burden was upon the defendant, the court had a right to take notice of St. 1895, c. 90, which established the valuation in question and showed that the statement to the jury was correct. *Harris* v. *Quincy*, 472.
2. The St. 1895, c. 293, relative to damages from fires communicated by locomotive engines, is not retroactive, and does not modify the rule of damages in a cause of action for a loss occasioned by fire set by a locomotive engine arising prior to its enactment. *Wild* v. *Boston & Maine Railroad*, 245.
3. No exception lies to the allowance by the judge, sitting without a jury, in an action for personal injuries received in a railroad accident, in assessing damages, as compensation for the loss of ability to earn money, a sum equivalent to the present worth of an annuity of fifteen hundred dollars for ten years, computing interest at four per cent. *Copson* v. *New York, New Haven, & Hartford Railroad*, 233.
4. In an action against a railroad corporation for personal injuries occasioned to the plaintiff while a passenger on its train by having his leg forced through a window and being dragged along the ground under a car which had been derailed and tipped over, the defendant is not entitled to a ruling that it would not be liable for blood poisoning unless it was the ordinary effect of such a wound. *McGarrahan* v. *New York, New Haven, & Hartford Railroad*, 211.
5. A person who has been injured in a railroad accident is bound to use due diligence to obtain proper medical treatment, and his duty in this respect is fully discharged by using ordinary care in procuring a reputable physician and in following his instructions; and the railroad corporation is not exonerated from liability for the results of the injury, although those results are more serious than if he had had better treatment. *Ibid.*
6. In an action against a railroad corporation for personal injuries occasioned to the plaintiff by the defendant's negligence, it is for the jury to determine whether his condition at the time of the trial was the effect of the injury so received, and, if it was, the relation of cause and effect is such as to subject the defendant to liability, which is to be measured by what they shall find to be the effect of the injury. *Ibid.*

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7. The jury are properly instructed that the plaintiff, in an action for personal injuries received in a railroad accident, is entitled to recover for his impaired capacity to earn money in the performance of manual or mental labor, and also the sum which he has properly expended in endeavoring to effect a cure, and that it is not necessary for him to prove the expenditure of any definite sum, but that the jury may use their own knowledge of the charges ordinarily made by physicians for their services in determining the amount to be allowed. *McGarrahan* v. *New York, New Haven, & Hartford Railroad*, 211.

See ACTION, 5; ATTORNEY AT LAW; BANK, 2; CONTRACT, 4; EMINENT DOMAIN, 1, 2; EQUITY, 4; EVIDENCE, 20, 25–29.

DEATH.

See ACTION, 7; EVIDENCE, 18, 19; INTERROGATORIES TO ADVERSE PARTY; NEGLIGENCE, 2–4; POWER, 2.

DECEIT.

See FALSE REPRESENTATIONS

DECLARATION.

1. Where an undertaking is conditional, the condition should be set out in the declaration as a part of the contract, and performance of it averred or the want of performance excused; and the allegation that the plaintiff has done and performed all things on his part in the agreement contained to be done and performed, and that he has kept all of the conditions of the agreement, is not sufficient. *Newton Rubber Works* v. *Graham*, 352.
2. Performance of the condition as to arbitration in a policy of fire insurance, in the Massachusetts standard form, or excuse for its non-performance, should be alleged in an action upon the policy, but the absence of such allegation should be availed of by demurrer, and the declaration may be amended. *Lamson Consolidated Store Service Co.* v. *Prudential Fire Ins. Co.* 433.
3. In an action on a written lease for rent, allegations that the indenture bore a certain date, that the term was for three years from that date, and that the unpaid rent which the defendant owed was for seven months from that date, are descriptive averments; and, if not proved as laid, a verdict is rightly ordered for the defendant. *Locke* v. *Kennedy*, 204.
4. In an action on a written lease for rent, a motion to amend the declaration at the hearing before the full court, so that the plaintiff will not be prevented from recovering by failure to prove that the day alleged was the exact date of the lease, is one with which the court has no power to deal, but which the plaintiff may renew in the court below, if he shall see fit. *Ibid.*

See INTOXICATING LIQUORS.

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DECREE.

1. So much of a decree, in the case of a bill in equity asking instructions as to the construction of a will as relates to an allowance to counsel for fees and expenses, is to be settled by a single justice, it not appearing that the allowance made includes the services of counsel on the appeal. *Bragg* v. *Carter*, 324.

2. Where it appears that whether the contents of an alleged will were known to the testatrix and whether they expressed her intentions depend wholly upon the testimony of the son, in whose handwriting the instrument is and in whose interest it is mainly drawn, it having been executed without the knowledge of the rest of the family or a word of counsel from any one but himself, and when the testatrix was of advanced years, and where the court is unable to believe his account of the interviews between himself and his mother which resulted in the execution of the instrument, a decree affirming a decree of the Probate Court disallowing the instrument as the last will of the testatrix will not be disturbed. *Jones* v. *Simpson*, 474.

See ADOPTION, 2; APPEAL, 1; EQUITY, 8–11.

DEDICATION.

See WAY.

DEED.

1. Where, on a bill in equity for the specific performance of an agreement executed in 1897 for the sale and purchase of real estate, the defendant refused to complete the purchase for the reason that a deed in the chain of title in 1839 was not acknowledged and recorded until 1859, after the death of the grantee, it being agreed that the title of the grantee, if he had any, had passed by mesne conveyances to the plaintiff, the court said that, there being nothing to show that the deed was not delivered on the day of its date, and there being evidence to show a title by adverse possession, which was almost, if not quite, conclusive, there was no reasonable doubt that the title of the plaintiff was good, and that the defendant could take it without special risk of being put to expense to defend his rights against unknown claimants who might thereafter appear. *Conley* v. *Finn*, 70.

2. The date of a deed is *prima facie* evidence of its delivery at that date, even though it was not acknowledged until a later date. *Ibid.*

3. Under a deed which conveys, in consideration of a stated sum paid by J., E., and D., a certain parcel of land, with a double cottage thereon, the entire lot being described by metes and bounds, "unto the said J., E., and D., their heirs and assigns," and which contains after the description the words, "It is understood that J. is to have No. 70, and E. and D. No. 72 in said cottage, to have and to hold the above granted premises, with all the privileges and appurtenances thereto belonging,

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to the said grantees, their heirs and assigns, to their use and behoof forever," J. takes one undivided third. *Dallagher* v. *Dallagher*, 503.

4. A speedway or driveway seventy-five feet wide running parallel with a public street and distant twenty-five feet therefrom, the intervening space being turfed over and planted with shade trees, the northerly line of the street and the southerly line of the speedway being also planted with trees, is a "boulevard," within the meaning of the condition in a deed that the land "shall be improved, dedicated, and forever used by the grantee as and for a common, park, or boulevard, and for no other purpose." *Howe* v. *Lowell*, 575.
5. The grantee of land in fee is entitled to make any use of it not prohibited by the conditions in the deed, whether the parties thought of it or not. *Ibid.*
6. The construction and maintenance by a city of a system of pipes below the surface of the ground, for the purpose of obtaining and distributing water to its inhabitants, do not constitute a breach of the condition in the deed of the land to the city, that it "shall be improved, dedicated, and forever used by the grantee as and for a common, park, or boulevard, and for no other purpose"; nor do the experiments made on the land incidental to the subsequent use and temporary in character, by driving iron pipes into the ground, the surface of which is left in a disturbed condition to some extent, constitute such a breach. *Ibid.*
7. The erection and maintenance by a city, for supplying its inhabitants with water, of a pumping station composed of a steam pump, engine, and boiler placed in a building upon land conveyed to the city by a deed containing the condition that it "shall be improved, dedicated, and forever used by the grantee as and for a common, park, or boulevard, and for no other purpose," are a breach of the condition. *Ibid.*

See Encumbrance; Evidence, 4; Foreclosure; Power, 2; Quieting Title, 2; Restriction; Trust and Trustee, 7, 8; Writ of Entry.

DEFINITIONS.

See Words.

DELIVERY.

See Conversion; Deed, 1, 2; Equity, 9; Evidence, 12; Frauds, Statute of, 4; Insurance, 4; Sale.

DEMAND.

See Interest.

DEMURRER.

See Declaration, 2; Intoxicating Liquors.

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DEVISE AND LEGACY.

1. Where, after giving the children of the testator a life interest, a will provides that "on the decease of either of the above named children, leaving a child or children, the proportion of such deceased child's income shall be given to said child or children," A., the survivor of A. and B., two children of a child of the testator, is entitled to the entire income to which the parent would be entitled if living, and B.'s children, who are great-grandchildren of the testator, have no interest therein, especially if that conclusion is favored by the other portions of the will. *Bragg* v. *Carter*, 324.
2. In creating a trust by will for the benefit of his widow and three children, the testator carefully provided for the effect of her death or of that of any one of the children upon the distribution of the net rents and income. The payments were to be made from time to time out of the rents and income collected by the trustees, semiannually, reckoning from the death of the testator, and each payment was to be made "to such of the said four persons, namely, my wife and three children, as may be living at the time of payment, and to the lawful issue then living of any my child who has then deceased," etc., and "shall be made either into the hand of the person named, or upon his or her written order, or receipt, given at or after the time, and not by anticipation or in compliance with any assignment." These four persons were not given by the will any interest in the rents and income except the right to receive these semiannual payments in the manner directed. If any one of them was not alive at the time when the payment should be made, only those living at that time were to receive the payment, and they were to receive all that was then payable. *Held*, on the death of the widow, that the net rents and income of the trust property received by the trustees after the date of the semiannual period of payment next preceding the date of the widow's death were not to be apportioned. *Hemenway* v. *Hemenway*, 42.
3. Where trustees are directed by will to convey, at the decease of the testator's wife, "all property held by them, not herein otherwise disposed of, to my heirs at law *per stirpes*," certain ground rents accruing from real estate leased in 1854 for ninety-nine years then next ensuing, and at the end of the term renewable forever, must be regarded as a part of the property so to be conveyed, especially when that conclusion is favored by a consideration of the different portions of the will. *Gage* v. *Wood*, 465.
4. The words, "when my wife has deceased and her funeral expenses have been paid, and all the provisions named in this will have been carried out, I will what is left of my estate be devided among my nearest of kin," there being a provision for the use of a certain one of the testator's tenements by a sister during her whole natural life, indicate, when considered with the whole scope of the will, the intention that those who shall be the testator's nearest blood relations at the death of the survivor of his wife and sister shall then take what shall be left of his property. *Leonard* v. *Haworth*, 496.
5. The father of the testator left eighty thousand dollars in trust, the in-

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come to be paid to the testator for life, and gave him a power of disposition over the corpus of the fund by will. The testator, after directing by the fourth clause of his will that, if his own residue was not sufficient, this fund should be used to make good any deficiencies in his mother's charitable legacies, by the fifth clause of his will appointed a fund, "or so much thereof as may remain after the foregoing provisions of my will shall have been satisfied, in equal shares to" an Institute and a Museum, "two institutions established in Boston," etc. There were no deficiencies to be made good under the fourth clause, the appointment was modified by the codicils, and the second codicil stated that it was not intended to dispose of any property over which the testator had a power of appointment. *Held*, that the whole fund was well appointed to the two institutions; that if the estate of the testator was insufficient to pay the legacies given in the second codicil, the fund in question was not to abate proportionately, and that if any interest had accrued since the death of the testator it should follow the fund. *White* v. *Massachusetts Institute of Technology*, 84.

6. By article 3 of his codicil a testator gave a table and a chromolithograph absolutely to A. "if living at my decease," and the gift to her daughter M. and other daughters successively was only in case A. was not living at the death of the testator. By article 4 there was a gift over after the decease of A. and her four daughters. By article 5 there was a gift of a clock to A., and at her decease it was to be disposed of in the same way as the table and chromolithograph were given by article 3, and after the decease of A. and her four daughters it was given to two persons successively. By article 6 the testator gave to A., "if living at my decease," various articles. *Held*, that A., who died after the testator, took only a life interest in the table and chromolithograph; that her daughters were to take successive life interests at her death, the articles to be first handed to M., that being the rule as to chattels of this sort; that the clock was to be disposed of in the same way; and that the things named in article 6 were given to A. absolutely, and were to be delivered to her representatives. *Ibid.*

7. Where articles are given by will to K., and one of them, on her decease, "may be first given to" E., and at her decease to M. and the others, if K. be not living at her decease "shall be given to the eldest daughter of" E., and at the decease of the latter to M., the articles are to be delivered by the executor to K. *Ibid.*

8. The question as to the gift by will of a hundred dollars a year, "should there be one or more persons at my decease but now not known in my employ who may have faithfully served me at home," is answered by the finding that the only persons answering the description are A. and B. The sum will be paid to each of them. *Ibid.*

9. The words in a codicil, "to each of my cousins in the first degree who is not remembered by a legacy from me in my will and codicils — to each of such cousins I give the sum of twenty-five hundred dollars," do not describe first cousins already deceased when the words were used, or the issue of such cousins, and therefore such issue cannot take, whether the

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testator knew of the death of their ancestor or not, and, in the absence of devise to their ancestor, they are not helped by Pub. Sts. c. 127, § 23; and "legacy" must be held to be "pecuniary legacy," so that cousins to whom bequests of articles of furniture or ornament were made are not "remembered by a legacy" within the meaning of the provision. *White* v. *Massachusetts Institute of Technology*, 84.

See ESTATES OF PERSONS DECEASED, 3; LIFE ESTATE; PERPETUITY; POWER, 2; TAX; TRUST AND TRUSTEE, 4, 6; WILL.

DISCHARGE.

See BANKRUPTCY; BOND; TRUST AND TRUSTEE, 5.

DISCONTINUANCE.

In an action in the Municipal Court of the city of Boston the judge found for the defendant and judgment was entered in his favor, from which the plaintiff appealed to the Superior Court to be held on the first Monday of July, 1896. On October 14 following, the plaintiff filed a discontinuance. Two days thereafter the defendant moved that the judgment of the Municipal Court be affirmed, on the ground that the plaintiff had failed to prosecute his appeal; and judgment was so affirmed. *Held*, that the appellant had a right to discontinue as he did, and that in entering the appeal and prosecuting it to the discontinuance he prosecuted it with effect as required by the statute. *Derick* v. *Taylor*, 444.

DISCOVERY.

See INTERROGATORIES TO ADVERSE PARTY.

DIVORCE.

Where, in a libel for divorce for gross and confirmed habits of intoxication, it appears that the libellee had contracted the habits after marriage; that he had not reformed during the year after the libellant separated from him, and that his habits continued during that year, at the end of which he went to parts unknown; that this was some five years before the hearing, and he had not been heard from since that time, save that about three years before the hearing it was rumored that he was somewhere in the West, but nothing definite was known about him, the presiding justice is at liberty, as matter of law, to draw the inference that the libellee's habits continued, if upon all the evidence he thinks that inference reasonable and proper. *McCraw* v. *McCraw*, 146.

See NULLITY OF MARRIAGE, 2.

DOWER.

See EQUITY, 5.

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DRAIN.

See ACTION, 1.

DUE CARE.

See ACTION, 6, 7; EMPLOYERS' LIABILITY ACT, 7; HIGHWAY; MASTER AND SERVANT, 2; NEGLIGENCE, 1, 3–7, 10, 11, 14.

DURESS.

1. A woman's son had been accused of stealing his employer's money, had made a confession, and agreed to give security for a certain sum. Upon the employer, with whom she previously had talked about her husband's condition, saying that he should have to tell her husband, who at that time was melancholy, very irritable, and unable to sleep, she said, "Don't do that, you know what his condition is"; and fearing that, if her husband was told of his son's crime, the knowledge would make him insane, in order to prevent the employer from doing so, she executed to him an assignment of her share in her father's estate, under which he collected the money. *Held*, in an action by her to recover it, that it could not be said that the jury would not be warranted in finding that the assignment was obtained by duress. FIELD, C. J., KNOWLTON & LATHROP, JJ., dissenting. *Silsbee* v. *Webber*, 378.
2. An act done under duress, which is formally valid, may be ratified when the restraint is removed, and the question of ratification is for the jury. *Ibid.*

EASEMENT.

A. owned a mansion-house, the land appurtenant to which was bounded easterly by T. Street, southerly by B. Street, and northerly by an open court about twenty feet wide, extending to his western boundary, and also owned by A. On the northerly side of the court he owned three dwelling-houses, facing southerly, and occupied by his married daughters. His mansion-house, having an ell extending westwardly, stood about three feet from the court, separated from it by a fence six feet high, in which was no opening. Five windows of the mansion-house opened on the court, in which was a drain used by all four houses. At his death A. devised the three dwelling-houses on the court to his daughters severally in fee, with the "respective privileges and appurtenances by them at the day of the signing of this will respectively occupied and improved," and devised his mansion-house to his wife for life, remainder to his son W., subject to the condition that they should personally occupy the same, "it being my design that the family establishment shall continue as much as possible unchanged," and the residue of his estate, including the open court, equally to his children. A.'s son W. having died, the mansion-house estate was conveyed by his administrator to D., who subdivided the estate, and con-

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veyed two of the lots created by such subdivision and fronting on B. Street to E. and F. The lots owned by E. and F. both bounded northerly on the open court, and both were west of the most westerly of the windows of the mansion-house, which, before its removal, had opened on the court, and no other buildings formerly standing on the mansion-house estate had depended on the court for light or air. The owners of the open court and of the land devised to A.'s daughters proceeded to erect a building over the court, leaving open only a covered foot passageway, and thereupon E. and F. sought to restrain such erections. *Held*, that the testator A. created no further easement in respect to keeping the court open above the surface of the ground than the ordinary easement of light and air for the benefit of the mansion-house estate, and that this easement was limited to the mansion-house itself, and did not extend to the land owned by E. and F. *Baker* v. *Willard*, 220.

See EMINENT DOMAIN, 3; QUIETING TITLE, 1.

ELECTIONS.

The only test given in St. 1893, c. 417, as to the appointment of registrars of voters from the two political parties which at the next preceding State election were the two leading political parties is, that the registrar shall act with that one of the leading political parties which he was appointed to represent; and it is not required that he shall be recognized as in regular standing by, or shall in all things act with, the predominant faction or division of that leading political party. *Jaquith* v. *Wellesley*, 138.

EMINENT DOMAIN.

1. Where the owner of land and buildings retains possession after the taking by a railroad corporation conformably to law, the rights of the parties growing out of that possession are not to be settled in the proceedings for damages occasioned by the taking; and the owner is entitled to interest from the time of the taking to the date of the verdict. *Imbescheid* v. *Old Colony Railroad*, 209.
2. The Superior Court cannot entertain a petition for the assessment of damages caused by the taking of the petitioner's land by a railroad corporation, which petition is not brought, as required by § 5 of the St. of 1890, c. 428, within one year after the date of the decree of the court confirming the decision of the commission appointed under § 1 of that statute. *Gately* v. *Old Colony Railroad*, 494.
3. In abolishing a grade crossing under St. 1890, c. 428, the commissioners reported that "the location of C. Street remaining unchanged, said street shall pass over the railroad tracks by a suitable bridge at a height of not less than sixteen feet in the clear above the grade of said tracks hereinbefore ordered," and then, having stated requirements for the descent of the grade, for the construction of the abutments and superstructure of the bridge, etc., reported that the above street "shall be graded to its full

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width, and the roadway shall have a dressing of good gravel," etc. "The gravel may be sloped beyond the limits of said C. Street so far as may be necessary to hold the embankment, and for this purpose the right and easement to enter upon the following parcels of land, and to construct and maintain the necessary slopes thereon, is hereby taken." Then followed a description of the land so taken, and for which damages were sought to be recovered. *Held*, that the right or easement acquired by the taking was not only the right to slope the filling so far as it might be necessary to hold the embankment, but the right to use the land for purposes for which any land may be used over which a highway is located. *Doon* v. *Natick*, 228.

See ATTORNEY AT LAW; CONSTITUTIONAL LAW; EQUITY, 4, 5; EVIDENCE, 28, 29.

EMPLOYERS' LIABILITY ACT.

1. A street car, operated by electricity in the usual manner cannot be said to be a locomotive engine on a train upon a railroad within the meaning of the employers' liability act, St. 1887, c. 270, § 1, cl. 3. *Fallon* v. *West End Street Railway*, 249.
2. It is a defence to an action against the city of Boston, under the employers' liability act, St. 1887, c. 270, and acts in amendment thereof, for personal injuries occasioned to a person at work on the subway authorized by St. 1894, c. 548, that the work was a public one over which the defendant had no control, but which was in charge of the transit commissioners, who were public officers engaged in the performance of public duties, and independent of the defendant, and not its servants or agents. *Mahoney* v. *Boston*, 427.
3. The mere act of a person employed in a quarry of fetching and putting down a can of powder preparatory to blasting in a place where it is soon afterwards overturned, so that an explosion occurs, must be regarded as an act of manual labor, and not of superintendence under the employers' liability act, St. 1887, c. 270, even if it is assumed that the act was a negligent one, and even if the principal duty of the person was that of superintendence. *Riou* v. *Rockport Granite Co.* 162.
4. At the trial of an action under the employers' liability act, evidence that a foreman of the defendant employed and discharged men, that he had seventeen or eighteen men working under him and subject to his orders as to the time of beginning and quitting work and as to the manner of its performance, and that he received higher wages than the others because he was the boss or foreman, is sufficient to show that his principal duty in the service of the defendant was that of superintendence. *O'Brien* v. *Look*, 36.
5. The fact that a foreman is paid higher wages than the ordinary laborers is a circumstance to be considered in connection with other evidence upon the question whether his sole or principal duty is that of superintendence. *Ibid.*

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6. At the trial of an action for personal injuries occasioned by the falling of a fore and after, so called, through the hatch of a vessel into the hold below, and striking the plaintiff, evidence that the plaintiff had been ordered by the defendant's superintendent to spread a tarpaulin over a part of the cargo in the hold to protect it from falling rain; that other laborers with a winch undertook to ship the fore and after over the combings of the hatch; that in so doing they attached to it the fall of the winch, whereupon the superintendent told the man in charge of the winch to go ahead; that, as the winchman started it, the whelps on the barrel of the winch slipped because it was wet; that the superintendent then took the bite of the fall on the winch head, took three turns, and lifted the fore and after over the combings; and that when some one called out to lower, he unwound the rope from the drumhead with his own hands in such a way that he could not control the fore and after, and it fell on the plaintiff, is sufficient to show negligence of the superintendent in the performance of his duty as superintendent. *O'Brien* v. *Look*, 36.
7. In an action under the employers' liability act, St. 1887, c. 270, it appeared that the plaintiff was engaged in carrying bricks in a wheelbarrow from an elevator to masons at work on a building; that he returned with his empty wheelbarrow for the purpose of descending with it on the elevator; that A., the defendant's superintendent, was standing on the elevator as he approached it; and that it was the custom, when a person had so placed himself on the elevator, for any one standing near to press the button near by as a signal to lower the elevator. The plaintiff testified that he asked A. if he had room to put his wheelbarrow on, and A. replied that there was not much room; and that he put the wheelbarrow on the elevator, and had one foot on it when it started down, causing him to fall. A. testified that he jumped upon the elevator and said, "Let her go"; that a workman who was standing near pressed the button and shouted, "Stand clear"; that a minute or so later the elevator started down; and that the first he knew of the plaintiff's being near was when he turned and saw him falling. *Held*, that the questions whether the plaintiff was using due care, and whether his injury was caused by the negligence of A. while exercising superintendence, were for the jury. *Cavagnaro* v. *Clark*, 359.
8. The plaintiff, a lineman in the defendant's employ, while engaged in stringing an overhead electric light wire which ran through and was obstructed by the branches of a tree, was ordered by one G., who was the foreman of the gang at work upon the wire, and who was accustomed to assist the men under him by performing various acts of manual labor when occasion required it, to cut off a limb of the tree; and after the limb had been cut, G. gave orders to the other men upon the ground to pull the wire back through the tree, and himself took hold of the wire with some of the others and pulled it, and the wire caught upon the limb of the tree upon which the plaintiff was standing, and which seemed to the plaintiff to be sound, and before the plaintiff had time to get into a safe position the limb broke and he fell and was injured. *Held*, that G.'s act in pulling on the wire was not an act of superintendency within the meaning of

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the employers' liability act, St. 1887, c. 270, and that the defendant was not liable. *Flynn* v. *Boston Electric Light Co.* 395.

9. A truck which consists of axles, wheels, and a frame, all fastened together and fitted to the tracks, and which is in constant use with other trucks as a part of the appliances of the repair shop of a railroad corporation for doing the work that is carried on there, is a part of the ways, works, or machinery within the meaning of St. 1887, c. 270; and in an action for the death of an employee caused by the falling upon him of a locomotive which had been placed on the truck, there is evidence that the truck was defective, if it appears that it had been there fifteen or sixteen years or more, that the effect of rolling such a truck on an iron rail is to flatten out the wheels, that the tendency of the constant use of iron is to weaken it for supporting weights, and that using it for heavy weights would weaken it much quicker; that testimony also would have tended to show, if admitted, as it should have been, that engines were twice as heavy as when the truck was purchased fifteen or seventeen years before and that this particular engine was one of the heaviest on the defendant's railroad. *Gunn* v. *New York, New Haven, & Hartford Railroad*, 417.

10. At the trial of an action against a railroad corporation for the death of an employee caused by the falling upon him of a locomotive, which had been placed on a truck in the repair shop, it is competent for the jury to find that, although the iron was sound where the wheel of the truck broke, yet, by reason of its long use and the increase in the weight of engines, the truck had become unsuitable for the use to which it was put, and that, if the wheel had been of proper strength, it would have withstood the strain caused by meeting the obstruction on the rail. *Ibid.*

11. An old and experienced employee, who was employed in taking down a building, was lying on the floor lifting a piece of iron which he was able to lift alone, and which had been loosened from the outside wall and was to be lifted to the floor. While in this position something struck him under his leg and he lost his balance and fell into the street and was injured. There was some evidence that a superintendent was near the plaintiff just before the accident, with a crowbar in his hand; but if the plaintiff was struck by the crowbar, none of the circumstances appeared. *Held*, in an action under the employers' liability act, St. 1887, c. 270, that, if there was any negligence, it did not appear not to have been that of a fellow servant. *Fleming* v. *Elston*, 187.

See ACTION, 5; EVIDENCE, 24.

ENCUMBRANCE.

1. In an action upon a covenant against encumbrances in a deed of land to recover the amount of a sewer assessment unpaid at the time of the conveyance, and which the grantee afterward paid, it is unnecessary for the plaintiff, if he proves that the sewerage system was laid out according to law, also to prove the validity of the assessment. *Smith* v. *Abington Savings Bank*, 178.

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2. After a town had voted to adopt a plan of sewerage, and to authorize the selectmen to levy an assessment of seventy per cent, based upon the average cost of all sewers, it voted, under an article "To see if the town will vote to lay a sewer assessment of seventy per cent of the total cost of all sewers," that it would "ratify the doings of the selectmen in levying the sewer assessment of seventy per cent." *Held*, that there was evidence from which it might be found that the selectmen had previously purported to levy the assessment on an estate so as to constitute an encumbrance thereon within the covenant against encumbrances in a deed of such land which was given three months before the last vote of the town. *Smith* v. *Abington Savings Bank*, 178.

See EVIDENCE, 4.

EQUITY.

I. *Jurisdiction and General Principles.*

1. A bill in equity by a judgment creditor, praying for the application of the earnings of a street railway company to the payment of his judgment, the appointment of a receiver, and an injunction to restrain an alleged creditor who has commenced an action from causing to be taken on execution the franchise or other property of the company which he has attached on mesne process, must be dismissed, as the remedy of the plaintiff is by a levy of his execution upon the franchise and the rights and privileges of the company thereunder "so far as [they] relate to the receiving of toll," and upon "all other corporate property real and personal," and a sale thereof pursuant to Pub. Sts. c. 105, §§ 31 *et seq.*; and if, after having levied the execution, the plaintiff or the purchaser at the sale contends that there is nothing justly due from the company to the alleged creditor who has brought suit against the company and attached its property, the plaintiff or such purchaser can proceed at law under Pub. Sts. c. 161, §§ 110 *et seq.*, to try the validity of the attachment. *Williams* v. *East Wareham, &c. Street Railway*, 61.
2. Under an indenture which provides that A., having conveyed his property to trustees, is to have the power of disposal of the estate by will, and, in default of appointment by will, the property is to go to his heirs, and that the trustees may retain as principal or pay over to him, discharged of all trust, the proceeds of any real estate which they may sell, A. has no interest in the corpus of the estate which can be reached by a creditor in equity under the Pub. Sts. c. 151, § 2, cl. 11, as amended by the St. of 1884, c. 285. *Crawford* v. *Langmaid*, 309.
3. A verdict for personal injuries before judgment has been entered upon it is not property which can be reached in equity. *Bennett* v. *Sweet*, 600.
4. A person who brings a bill in equity against a town and its water commissioners, to restrain an interference with his rights and for damages by reason of a defective taking of water, is not obliged, because the defect is cured subsequently, to have his damages assessed under the statute which authorizes the taking, but is entitled to have the bill

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retained for an assessment of all damages which he has sustained down to the filing of the same. *Lexington Print Works* v. *Canton*, 414.

5. When land is taken by the right of eminent domain, the wife of the person whose land is so taken is not entitled, by reason of her inchoate right of dower, to have a portion of the proceeds set apart by a court of equity for her benefit in case she survives her husband. *Flynn* v. *Flynn*, 312.

See ASSIGNMENT, 2; DEED, 1; EQUITY, 7; FRAUDS, STATUTE OF, 2, 3; MUTUAL INSURANCE, 1; PRIORITY; QUIETING TITLE, 1; TRUST AND TRUSTEE, 8; WAIVER, 1; WAY.

II. *Pleading and Practice.*

6. If one seeks by a bill in equity to establish a trust in a deposit in a bank, and to set up a title adverse to the depositor, the depositor is a necessary party to the suit. *Gregory* v. *Merchants' National Bank*, 67.

7. Where money is deposited by order of the Circuit Court of the United States in a bank, and is held by it subject to withdrawal only upon an order of one of the judges of that court, no proper inquiry can be made as to the ownership of the fund without making the judges of the court parties to the suit; and whether the order under which it was paid was properly or improperly made cannot be determined upon a proceeding to obtain the money in another court, the Circuit Court, by virtue of a suit in equity pending therein to determine the rights of the respective claimants, having exclusive jurisdiction of the subject matter and of the parties. *Ibid.*

8. Where an appeal is taken from a decree of a justice of the Superior Court dismissing a bill in equity, and there are no rulings of law or findings of fact by the justice making the decree, the only question for this court is whether such decree could properly have been entered upon any view which the presiding justice might have taken of the evidence. *Evans* v. *Strachan-Hanscom*, 64.

9. Where a bill in equity was brought for the specific performance of a written agreement for the conveyance of real estate, the testimony showed that the agreement was signed by the defendant and placed by him in the hands of an intervening broker, by whom it was subsequently handed to the plaintiff, and the evidence upon the question whether the delivery of the agreement was authorized by the defendant was conflicting. The presiding justice made a decree dismissing the bill, and made no finding of fact or ruling of law. *Held*, that it could not be said as matter of law that upon the evidence the presiding justice properly could not enter a decree dismissing the bill with costs. *Ibid.*

10. After the answer and the replication had been filed in a suit in equity, issues of fact were framed for a jury, the judge ruling, on the plaintiff's offer of proof, that the suit could not be maintained. Upon a hearing in this court, the ruling was reversed and the case was ordered to stand for trial, at which the defendant had a verdict, which was set aside on the ground that an article prejudicial to the plaintiff was sent by one

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of the defendant's counsel, not now in the case, to a newspaper printed in the county for publication, and that a copy containing the article was sent by him, just before the trial, to all the jurors upon the panel "with the design, and for the purpose of improperly influencing, interfering [*sic*], and corrupting the jury in the discharge of their duty." The case was afterwards twice continued, and then the plaintiff filed its motion, upon which the judge entered a decree dismissing the plaintiff's bill without prejudice, with costs to the defendant, and with a provision made under the plaintiff's stipulation, that, if another suit was brought against the defendant for the same cause, the defendant might, if he desired, have a trial by jury upon the issues of fact. *Held*, that the decree, which was made nearly three and a half years after the suit was begun, was in the nature of an exercise of discretion, or a decision of fact upon the facts reported, and that the court could not say that it was not warranted. *Hollingsworth & Vose Co.* v. *Foxborough Water Supply District*, 450.

11. The rule that, when questions of fact are determined in equity upon the oral testimony of witnesses, the decision of the justice who saw the witnesses will not be reversed unless it is plainly wrong, applies to questions of discretion decided upon such testimony, as well as to other questions of fact. *Ibid.*

See APPEAL, 1; DECREE, 1; GUARDIAN AND WARD, 4; PARTNERSHIP, 2; RECEIVER; TRUST AND TRUSTEE, 3.

ERROR.

See WRIT OF ERROR.

ESTATES OF PERSONS DECEASED.

1. The words "the settlement of an estate," in Pub. Sts. c. 136, § 26, mean such an actual settlement of it that the plaintiff could not have obtained full satisfaction of his claim against the estate under the preceding provisions of the chapter by any proceeding against the executor or administrator if he had used the diligence which the statutes require. But if none of the remedies under the preceding provisions of the chapter were open to him, or would have enabled him to recover his claim in full, and he has used due diligence, then his remedy to recover what is due is under § 26 and the following sections, to the extent of the real or personal property that have been received by the heirs, next of kin, devisees, and legatees; and in order to proceed under this section it is not necessary that the settlement of the estate by an administrator or executor should formally appear in the records of the Probate Court, but, if an executor or administrator has been properly appointed and qualified, and has given notice of his appointment, the fact that the estate has been fully administered or has been actually settled may be shown by any competent evidence. *Forbes* v. *Harrington*, 386.

2. Where a master reports that the only evidence showing any property personal or real that ever came into the hands of L., executor of the estate

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of S., was the inventory filed in the Probate Court, which showed no personal estate, the plaintiff's exceptions thereto, on the ground that the master did not find that no personal property ever came into the hands of L. as executor of the will of S., and, the time having expired for bringing actions against the executor, did not find that the estate was settled within the meaning of Pub. Sts. c. 136, § 26, but found that the estate "still remains unsettled," must be sustained; and, unless the parties desire to offer evidence on the subject, it should be found and ruled that the estate has been settled within the meaning of Pub. Sts. c. 136, §§ 26 *et seq.* *Forbes* v. *Harrington*, 386.

3. While, after the waiver by a widow of the provisions made for her in her husband's will she cannot demand that funds, as directed therein, shall be kept to pay the expenses of her funeral, and to erect a suitable tablet at the head of her grave, it is the duty of the executor, notwithstanding the objections of the widow, to retain funds sufficient for those purposes, until, upon her death, the funds shall be so expended, or their use, as the testator has willed that they should be used, shall have been shown to be impossible. *Leonard* v. *Haworth*, 496.

See DECREE, 2; DEVISE AND LEGACY; EASEMENT; ESTOPPEL, 1; EXECUTOR; LIFE ESTATE; TAX; TRUST AND TRUSTEE, 4, 6.

ESTOPPEL.

1. An administrator who, under leave of the Probate Court, conveys land of his intestate, bounding it "in part on a court," which was owned by his intestate with others as tenants in common, does not create by estoppel a right to have the court left open. *Baker* v. *Willard*, 220.

2. The fact that a creditor has proved a claim in insolvency upon a judgment against a judgment debtor is not a bar to an action against a surety on a recognizance to appear for examination as a poor debtor, entered into by the same debtor when execution issued against him. But whether it would be ground for a continuance, or for a stay of execution until it could be ascertained what dividend the creditor would receive in the insolvency proceedings, *quære*. *Harris* v. *Hayes*, 275.

See CHECK, 8, 9; PARTNERSHIP, 1; WRIT OF ENTRY, 2, 3.

EVIDENCE.

1. The record of a police court may not be controlled by oral evidence. *Tufts* v. *Hancox*, 148.

2. Oral evidence is admissible to show that a bill of sale of personal property, although absolute in form, was made in trust or by way of security. *Raphael* v. *Mullen*, 111.

3. At the trial of a petition to set aside a decree of adoption, the petitioner offered in evidence the will and inventory of the adopter's mother as a step in the proof that he got most or all of his fortune from her, and that she cut off the parent of the adopted children with a small sum, the

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object being to show that the adoption, which was treated as standing on the same footing as a will, was unnatural and inconsistent with the adopter's duties. *Held*, that the evidence offered was rightly excluded. *Collamore* v. *Learned*, 99.

4. Upon the trial of an action on a covenant in a deed of land against encumbrances except "the taxes assessed for the year 1893," evidence offered by the defendant that the written contract of sale in pursuance of which the deed was given stated that a good and clear title should be given except the taxes assessed on May 1, 1893, was properly excluded. *Smith* v. *Abington Savings Bank*, 178.
5. When in proving the laying out of a sewer in a town it becomes necessary to show that the town voted to adopt a plan and system of sewerage made by a civil engineer, it is competent, after the town clerk has testified that he cannot find the report among his records, to admit a letter, produced from other custody, signed by the engineer, addressed to one of the committee of the town, and proposing a system of sewerage which the town clerk testifies he has no doubt was the report adopted. *Ibid.*
6. Where the report of a civil engineer recommending a plan of sewerage for a town, which is in evidence, refers to an accompanying plan or map, and the town clerk testifies that he cannot find the original plan in his office, an office plan of the engineer, a copy of which he testifies was delivered to the town, is competent, and the evidence will warrant a finding that it was the map or plan referred to in the report. *Ibid.*
7. At the trial of an indictment for murder, it appeared that early in the morning of a certain day the house of the man alleged to have been murdered was burned down, and the remains of a human body of uncertain sex were found in the ruins. There was no identification of the body otherwise than by the place where it was found, by the fact that the man had been seen at his house the previous evening and was seen no more, and by a clasp of a pocket-book like his found near the remains; and there was no direct evidence of the commission of a crime. *Held*, that the other evidence in the case, relating mainly to the appearance and conduct of the defendant after the fire, to the articles found in his room, and to the habits of the missing man, taken with the facts above mentioned, warranted the jury in finding it proved beyond a reasonable doubt that the man was murdered, and was murdered by the defendant. *Commonwealth* v. *Williams*, 461.
8. At the trial of an indictment for the murder, in July, of a man whose house was burned down, the remains of a human body supposed to be his being found in the ruins, it appeared that officers who searched the defendant's room found two secreted twenty-dollar gold pieces; and that the missing man had no bank account, but apparently kept his money as he earned it, except the very small sums which he had to spend for his living. *Held*, that evidence that the man was paid one twenty-dollar gold piece in December preceding the fire, that he exhibited four such pieces in the following March, and exchanged one for paper money, and that he had three such pieces at Easter and in May, was not open to the objection of remoteness, having regard to his habits. *Ibid.*

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9. A person who was under arrest upon suspicion of robbery and murder, and whose room had been searched by an officer and bloody clothing and two secreted gold pieces found there, and who previously had told of having been assaulted and having found some money, was asked by the officer, "How is it that that blood came on your drawers?" to which he replied, "This morning when I came into my room my hands were all bloody and I took the first thing that I could find to wipe them off, and that was the pair of drawers." He was then asked by the officer, who exhibited the gold pieces, "Do you know where I got those?" and answered in the negative. The officer then said, "I got them up in your room under the carpet on the floor"; to which he replied, "I know it, I put them there." *Held*, upon an indictment for murder, that the evidence of what he said to the officer was admissible. *Commonwealth* v. *Williams*, 461.

10. At the trial of an action for malicious prosecution in causing the plaintiff to be arrested and bound over on a charge of larceny of goods from an officer which he had attached on a writ in favor of the defendant against the plaintiff, it is open to the defendant to show by parol evidence that the officer had in fact attached the goods, though they were not enumerated in his return; and its exclusion by the judge on the ground that the attachment and the goods that were attached must appear from the officer's return on the writ, without calling the attention of the jury in any way to the effect of the plaintiff's admission that the officer had attached the property, and that the plaintiff had broken open the premises and assisted in carrying it away, operates to the prejudice of the defendant. *Whiteside* v. *Lowney*, 431.

11. When a promissory note is indorsed by the payee after it is overdue, admissions by the payee while owner of the note are admissible in evidence against the indorsee in an action by him against the maker. *Sears* v. *Moore*, 514.

12. At the trial of an action of contract for the price of goods sold to the defendant upon a verbal order given by his agent, evidence as to how the goods were directed is admissible, not only in proof of the delivery of the goods, but, in connection with the bill for the goods and the correspondence of the parties, as an admission by the defendant. *Bertha Mineral Co.* v. *Morrill*, 167.

13. In an action by the payee against the drawer of a check, which had been stolen by the payee's clerk, put in circulation with a forged indorsement, paid by the bank upon which it was drawn, and returned to the drawer, from whom it was obtained afterwards by the payee, who had been informed of the forgery, evidence of what was done by the plaintiff after he knew of the forgery is admissible. *Shepard & Morse Lumber Co.* v. *Eldridge*, 516.

14. If, at the trial of an action for the price of goods sold by the plaintiff to the defendant, the plaintiff has testified as to the contract of sale agreed upon in a conversation between him and the defendant's agent, and its subsequent ratification by the defendant, testimony in corroboration of such conversation is admissible. *Allin* v. *Whittemore*, 259.

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15. At the trial of an action for the price of horses sold by the plaintiff to the defendant, a witness for the defendant, for the purpose of showing that the delivery of the horses was not in pursuance of a completed sale, testified that at the time of the delivery of some of the horses he asked directions from the plaintiff, and that the plaintiff assumed authority on his own part to give directions. *Held*, that for the purpose of contradicting this witness it was competent for an expressman who had been sent by the plaintiff to the defendant for the trunks containing blankets, harnesses, etc., to testify that the previous witness had refused to give them up, and had said that the defendant wanted them to go with the horses. *Allin* v. *Whittemore*, 259.

16. When, in an action for the price of horses sold by the plaintiff to the defendant in pursuance of a contract of sale made between the plaintiff and an agent of the defendant, the agent in his testimony contradicts the plaintiff and denies the sale, evidence of conversations in which he stated that he bought the horses for the defendant, and that the defendant owned them, is admissible for the purpose of contradicting him. *Ibid.*

17. It is not necessary, before contradicting the testimony of a witness produced by the other side by proof that he has said something inconsistent with it, to call his attention to the occasion and give him a chance to explain. *Ibid.*

18. At the trial of an action under Pub. Sts. c. 112, § 213, evidence that persons did not hear the bell of the engine rung is competent, in connection with other evidence that they had passed over the crossing when the accident occurred, and, after having gone a short distance, had their attention attracted solely by the approaching train, toward which they turned, and watched it as it approached. *Walsh* v. *Boston & Maine Railroad*, 52.

19. At the trial of an action under Pub. Sts. c. 112, § 213, evidence that the accident occurred at half past nine o'clock in the evening; that the deceased when last seen by any one but the gateman was slowly approaching the railroad crossing seated in an open carriage, and driving a safe horse; that his view of the track in the direction from which the train was coming was obstructed; that, although he was familiar with the crossing, he did not know that the train by which he was struck had recently begun running; that the bell of the engine had not been rung nor the whistle blown before approaching the crossing; and that the gateman had given no warning of the approaching train, — is competent for the consideration of the jury on the question of the negligence of the defendant. *Ibid.*

20. In an action for personal injuries received by the plaintiff while in the employ of the defendant, the wages that the plaintiff was receiving as an employee at the time of the accident may be shown as bearing on the question of damages. *O'Brien* v. *Look*, 36.

21. At the trial of an action for personal injuries occasioned by the fall into the hold of a vessel of a fore and after, which the servants of the defendant were attempting to place over the combings of the hatch, an expert may answer a hypothetical question as to whether the method adopted of lowering the fore and after was proper. *Ibid.*

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22. At the trial of an action for personal injuries sustained by the plaintiff while in the employ of the defendant, evidence is admissible that a seat, on which he sat at his work, and by the tipping of which the accident happened, had tipped before, and that the fact was known to the man authorized by the defendant to instruct and order the plaintiff in its use. *Spaulding* v. *Forbes Lithograph Manuf. Co.* 271.

23. At the trial of an action for personal injuries sustained by the plaintiff while in the employ of the defendant, while obeying the order of a person over him and who was authorized to instruct and direct him, evidence by another operative of orders given by such person is competent for the purpose of showing his authority. *Ibid.*

24. At the trial of an action under the employers' liability act, St. 1887, c. 270, for causing the death of an employee, alleged to have been due to the negligence of a person in the defendant's service intrusted with "superintendence," a fellow employee cannot be asked, "Have you ever noticed anything with regard to the care or the method which the superintendent uses in his work?" and, "Have you noticed whether or not the superintendent in directing the work has any tendency either to show great care or to rush work?" *Gunn* v. *New York, New Haven, & Hartford Railroad*, 417.

25. Evidence that one who practises as a physician or surgeon attends a patient and gives him professional assistance justifies a finding that the services are rendered for a pecuniary recompense to be paid by the patient. *McGarrahan* v. *New York, New Haven, & Hartford Railroad*, 211.

26. Evidence that a sick person is kept and cared for at a private house other than his home justifies a finding that he is there upon expense. *Ibid.*

27. Evidence that a person has been engaged for two years in studying for a profession, and that he has been employed to do certain labor, taken in connection with his appearance and with testimony to the effect that he is permanently disabled by disease of the heart, is enough to justify a finding that his capacity to earn money has been lessened. *Ibid.*

28. If, at the trial of a petition for the assessment of damages for the taking of land by a city, an understanding between court and counsel is arrived at by which all inquiry as to the crops thereon, except as they are an element in the value of the land on the day of the taking, becomes immaterial, then the answer to a previous question that the witness, who was the husband of the petitioner, raised them by consent of the city after the taking, and the exception to that answer, also become immaterial. *Jurada* v. *Cambridge*, 144.

29. Where, at the trial of a petition for the assessment of damages for the taking of land by a city, a person who carries on a large market garden farm in a neighboring town, who has written and lectured upon agricultural subjects, and who examined the crops standing upon the land a few days after the taking, is not offered as a witness to the value of the land taken, it is within the discretion of the presiding justice to exclude his opinion of the value of the crops as they stood upon the soil. *Ibid.*

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30. The work of stringing wires from one pole to another through branches of an intervening tree is one within the range of ordinary knowledge, experience, and observation; and it is not a matter as to which expert testimony will be admitted. *Flynn* v. *Boston Electric Light Co.* 395.

31. An expert witness is rightly allowed to explain, in an action to recover compensation for the use of inventions, the operation and supposed advantages of the inventions, the letters patent and models of which are before the jury. *Burton* v. *Burton Stock Car Co.* 437.

32. It is within the discretion of the judge, in an action to recover compensation for the use of inventions in the construction of stock cars, to permit a witness to give an opinion of the value of the use of such inventions, if he testifies that he has taken out between forty and fifty patents for stock and cattle cars, has made out specifications for these patents, is pretty familiar with the devices used on stock cars, has had ten or twelve years' experience with stock cars outside of his experience as an inventor, has held several offices in the defendant stock car company, and had full charge of the construction of its cars for five or six years, and is familiar with other kinds of stock cars. *Ibid.*

33. That the letters patent for inventions were not actually issued when the defendant used the inventions can be considered by the jury in estimating the weight to be given to the opinion of an expert witness as to the value of such use, even if the defendant did not choose to call the attention of the witness to the fact. *Ibid.*

See Action, 2; Adoption, 2; Assignment, 3; Attorney at Law; Check, 8; Conflict of Laws, 2; Contract, 3, 4; Damages, 1; Declaration, 3; Deed, 2; Employers' Liability Act, 4, 5, 9; Encumbrance; Equity, 8, 9, 11; Estates of Persons Deceased, 1; Exceptions; Invention, 3; Lease, 1, 2; Negligence, 3, 4, 9, 10, 13, 14; Partnership, 2; Passenger; Principal and Agent; Promissory Note; Quantum Meruit; Trial, 2; Trust and Trustee, 2.

EXCEPTIONS.

1. Upon a bill of exceptions this court cannot pass on the weight of the evidence, if there was any evidence which tended to establish the facts found by the jury. *Fox* v. *Chelsea*, 297.

2. No exception lies to the exclusion of photographs as evidence, if, so far as appears, their rejection was on the ground that the party offering them failed to make out the preliminary matters of fact necessary to make them admissible. *Harris* v. *Quincy*, 472.

3. A special finding of fact by a judge, sitting without a jury, will be disregarded, where evidence relevant and material to the question was wrongly excluded, even if the finding was correct upon the evidence admitted. *Shepard & Morse Lumber Co.* v. *Eldridge*, 516.

4. Where requests for rulings, which are refused, are founded upon an assumption that certain facts are proved in the case, if there was any evidence which would warrant a different finding of the facts, it must be

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assumed, upon exceptions, that they were so found. *Quin* v. *Bay State Distilling Co.* 283.

See CONTRACT, 1; DAMAGES, 3; ESTATES OF PERSONS DECEASED, 2; EVIDENCE, 28; NEW TRIAL; TRIAL, 2.

EXECUTION.

See EQUITY, 1; ESTOPPEL, 2; FALSE RETURN; OFFICER; QUIETING TITLE, 2.

EXECUTOR.

In the case of money, if no trustee is specially named or appointed, the executor is to hold the money in trust and pay the interest only to the person entitled for life. *White* v. *Massachusetts Institute of Technology*, 84.

See ESTATES OF PERSONS DECEASED; TAX, 2, 3; TRUST AND TRUSTEE, 4.

EXPERT.

See EVIDENCE, 21, 29–33.

FALSE REPRESENTATIONS.

Representations in regard to the value largely in the future as an investment of the stock of a company organized for the manufacture and sale of certain machines, one of which the vendee before purchasing the stock had seen in operation at the vendor's house and which he knew was not perfected, when considered in connection with the nature of the property and with the fact that the vendee must have known all the time that the vendor was one of the promoters of the corporation and greatly interested in the stock and in the sale of it, are expressions of opinion which will not sustain an action for deceit. *Lynch* v. *Murphy*, 307.

FALSE RETURN.

Where, in an action by A. against B., a deputy sheriff, for making a false return upon an execution against C., who had been arrested by B. thereon and for whose appearance A. had recognized, it appears that A. could not defend against the recognizance by contradicting B.'s return of an arrest of C. in that as to parties and privies the return was conclusive, A. was injured by that return, if it was false, and the case should be submitted to the jury. *Simmons* v. *Richards*, 281.

FEE.

See LIFE ESTATE.

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FENCE.

1. If as between two adjoining owners the duty to maintain a partition fence is upon one of them exclusively, the other owner is not liable to a third person for a personal injury caused by the fall of the fence. *Quinn* v. *Crimmings*, 255.
2. If the owner of a partition fence uses the care of a prudent man in maintaining it, he is not liable to a third person for a personal injury caused by its fall. *Ibid.*

FIRE INSURANCE.

See CONDITION; DECLARATION, 2; INSURANCE, 1–6; MUTUAL INSURANCE.

FIRES.

See DAMAGES, 2; NEGLIGENCE, 12–14.

FISH AND FISHERIES.

See SHIPS AND SHIPPING.

FORECLOSURE.

Where the title of the obligor of a bond for a deed has been foreclosed by a valid mortgage sale, and the land has been thereafter sold to *bona fide* purchasers, who took for value and without knowledge or notice of the claim of the obligee, he cannot charge a new intending purchaser with any duty to himself by notifying him before his purchase of the facts with reference to the bond for a deed. *La Fleur* v. *Chace*, 59.

See LEASE, 3; TRUST AND TRUSTEE, 9.

FORFEITURE.

See DEED, 7; RESTRICTION; WRIT OF ENTRY.

FORGERY.

See BANK, 2; CHECK, 1, 3, 5–9; EVIDENCE, 13.

FRAUD.

See BANKRUPTCY; DURESS; FALSE REPRESENTATIONS; FRAUDULENT CONVEYANCE; TRUST AND TRUSTEE, 1.

FRAUDS, STATUTE OF.

1. The recorded vote of a corporation, or of a committee acting upon a subject over which the committee has power, is a sufficient memoran-

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dum within the meaning of the statute of frauds, Pub. Sts. c. 78, § 1. *McManus* v. *Boston*, 152.

2. It is not necessary that the memorandum should be addressed to the other party to the contract, so far as the statute of frauds, Pub. Sts. c. 78, § 1, is concerned; nor, if it was passed as an offer to the plaintiff in a bill for specific performance, or as an acceptance of his offer, is it necessary that the vote should be addressed to him. *Ibid.*

3. In this case, which was a bill in equity against the city of Boston for a decree of specific performance of an agreement to purchase land of the plaintiff, the court said that the vote of the board of street commissioners to purchase the land for the city for school purposes constituted a contract of purchase, the plaintiff having signed on the same day a written agreement under seal to convey the land to the city for the sum named, of which contract to purchase the vote was a sufficient memorandum within the meaning of the statute of frauds, Pub. Sts. c. 78, § 1; and that as the price, which was considerably more than the amount paid by the plaintiff for the land not long before, he having purchased the same in anticipation of the action of the school committee and street commissioners, was not shown to be exorbitant, the contract was not shown to be unconscionable; and that the plaintiff was entitled to a decree. *Ibid.*

4. At the trial of an action for the price of goods sold by the plaintiff to the defendant, in which the answer is a general denial, the correctness of a refusal to rule that the case is within the statute of frauds is unnecessary to be considered if the jury find that there was evidence of a delivery and acceptance of the goods by the defendant. *Allin* v. *Whittemore*, 259.

See BANKRUPTCY; SHIPS AND SHIPPING.

FRAUDULENT CONVEYANCE.

1. An assignee in insolvency may avoid a conveyance by the debtor of all his property in trust for the benefit of such creditors as should become parties to it, made within two months before the insolvency proceedings. *Cunningham* v. *Seavey*, 341.

2. In an action by an assignee in insolvency, alleging in one count a conveyance to the defendant in fraud of the insolvent law, which was a conveyance by the debtor of all his property in trust for the benefit of such creditors as should become parties to it, and alleging in another count conversion of the proceeds, a finding for the plaintiff is not open to the contention that it was unwarranted, because the defendant had ceased to act under the assignment at the time of the adjudication of insolvency, and after that he was rightfully in possession of the funds as custodian for the messenger in insolvency, and after his appointment, for the assignee in insolvency. *Ibid.*

3. A person who, within two months before insolvency proceedings, has taken a conveyance by the debtor of all his property in trust for the benefit of such creditors as should become parties to it, and who has been served with a trustee writ in another State, where the debtor also had a place of

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business and also had instituted proceedings in insolvency, cannot relieve himself from liability to the assignee in insolvency here by depositing the proceeds of the property in the other State. *Cunningham* v. *Seavey*, 341.

GARNISHMENT.

See TRUSTEE PROCESS.

GOODS SOLD.

1. At the trial of an action for the price of goods sold to the defendant in October, 1895, there was evidence tending to show that they were sold to him as receiver of the company on the verbal order of an agent; that as such receiver he had previously purchased like goods of the plaintiff; that the goods were shipped to him as receiver, and letters were sent to him addressed "A. T. M., Receiver C. & K. Co.," asking for "your check" and for settlement of "your account," to which he replied on paper headed "M. Brothers Company," promising payment and signing it "A. T. M." Payment having been delayed, the plaintiff again wrote, asking the defendant to "let us have your check by return mail." This was answered on paper of the "B. Manufacturing Company," of which, when the goods in controversy were ordered, the defendant was treasurer, and to which he had sold the assets of the C. & K. Company. A subsequent letter, signed by the B. Manufacturing Company, was sent, saying, "We will send you a check on Saturday." The plaintiff replied that he knew nothing of the company, and looked to the defendant for payment. Subsequently a check for a partial payment was sent in a letter signed "B. Mfg. Co., A. T. M., Treas.," which stated that the company had always regarded this account as belonging to it as successor of the C. & K. Co., but added, "However, this is a matter of little importance." *Held*, that the jury were warranted in finding that the defendant was liable. *Bertha Mineral Co.* v. *Morrill*, 167.
2. A., who was the agent of a corporation in a certain city, and also had the exclusive sale of B.'s bicycles in that place, asked B. to have "my tires" (meaning the tires made by the corporation) put on the wheels which he ordered, B. giving him credit for the tires, and said that for his own accommodation he would like to have the tires come from the corporation, and to have them charged to B., because he would like to keep the tire account separate. Accordingly it was arranged that A. should send the goods from the corporation, billed by the latter to B., and that they should be credited to the corporation and be charged off by a draft of B. on A. in favor of the corporation, and the bicycles sent to A. were to be charged to him by B.; and this course of business was pursued. Bills were sent by the corporation to B. without objection on the part of the latter, who, upon request by the corporation for payment, sent it a draft in settlement of account, requesting that it be placed to his credit. *Held*, in an action by the corporation against B. for tires sold and delivered, that a finding for the plaintiff was warranted. *Sercombe-Bolte Manuf. Co.* v. *John P. Lovell Arms Co.* 175.

See EVIDENCE, 12, 14–16; FRAUDS, STATUTE OF, 4; SALE.

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GOOD WILL.

See RESTRAINT OF TRADE.

GRADE CROSSING.

See EMINENT DOMAIN, 2, 3.

GRAND JURY.

1. The provision in Pub. Sts. c. 213, § 1, that venires for grand jurors must be issued not less than seven nor more than thirty days before the commencement of the first term of the Superior Court in each year, means the first term for the transaction of criminal business. *Commonwealth* v. *Krathofski*, 459.
2. The provisions of Pub. Sts. c. 170, § 18, that, if a person drawn as a juror is exempt by law or is unable by reason of sickness or absence from home to attend as a juror, his name is to be returned into the box and another drawn in his stead, necessarily imply that the decision of the aldermen is to be made upon the spot, and that such decision is final; and, even if the decision honestly made was wrong, no objection is open on this ground. *Ibid.*
3. *It seems* that a constable may be rightly allowed to amend his return on a venire issued for grand jurors. *Ibid.*

GRAVE.

See ESTATES OF PERSONS DECEASED, 3; PERPETUITY.

GUARANTY.

1. B. executed to A. a guaranty "to the extent of ten thousand dollars, on obligations contracted and to be contracted by C. with A. for a period of three years, with the understanding that A. give C. a permanent credit of at least twenty thousand dollars in leather for the above period of three years." Before B. signed the guaranty C. exhibited to him an instrument to be signed by A. and told him the contents of it, and told him also that, if he would sign the guaranty, it would keep C. on his feet and keep him going. A. signed the instrument, which was as follows: "For one dollar and other considerations, I, A., guarantee C. a permanent credit for three years to the amount of twenty thousand dollars in leather, and agree that C. shall not owe A. less than twenty thousand dollars at any time during this period, except at his own option, and C. agrees to buy leather from A. to the extent of at least twenty-five thousand dollars per annum, and A. agrees to sell C. as cheap as any reliable shoe manufacturer. This agreement to be null and void in case C. becomes insolvent during this period." *Held*, in an action by A. against B. on the guaranty, that,

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when the instrument was signed, the consideration for the guaranty was furnished; that the circumstances might be considered in aid of the interpretation; and that the words "with the understanding" referred to the instrument so signed. *Lennox* v. *Murphy*, 370.

2. If a guaranty by B. to A. of obligations to an amount named to be contracted by C. with A. for a certain period is executed on the understanding that, if it is signed, A. will sign an instrument, which is exhibited to B., agreeing to give C. a credit for that period, it is not necessary that B. should be notified of the acceptance of the guaranty by A. *Ibid.*
3. It is no objection to an action upon a guaranty to a certain amount "on obligations contracted and to be contracted" by C. with A., with the understanding that A. give C. a credit of a sum named in merchandise, that, although C. owes A. more than that sum, only a portion of it is in the form of a debt for merchandise, and the rest is in the form of notes, which were given for merchandise. *Ibid.*
4. A guaranty executed by B. to A. to a certain amount on obligations to be contracted by C. with A. "for a period of three years," with the understanding that A. give C. a credit of a sum named "for the above period of three years," may be sued upon before the expiration of the three years. *Ibid.*

See ASSIGNMENT, 1.

GUARDIAN AND WARD.

1. A petition for a writ of error to reverse a judgment against a ward should be brought in the name of the ward, by his guardian or next friend. *Taylor* v. *Lovering*, 303.
2. There is no statute which permits the service of a writ against an insane person who is under guardianship to be made upon the guardian instead of upon the ward. *Ibid.*
3. The practice is to require the same service upon infants, or upon persons under guardianship or of unsound mind, as upon other defendants, and then to give notice of the proceedings to the guardian, if there be any, and he does not appear without notice; and if the guardian does not appear and defend the action in the name of his ward, or if there is no guardian, a guardian *ad litem* should be appointed for that purpose. *Ibid.*
4. The practice of appointing guardians *ad litem* prevails in this Commonwealth in actions at law as well as in suits in equity. *Ibid.*

See BOND.

HIGHWAY.

Where, in an action for personal injuries occasioned to the plaintiff by an alleged defect in the sidewalk of a street in the defendant city, the only question, which is whether the plaintiff was in the exercise of due care if he was walking as he usually walked, looking straight ahead, on an icy sidewalk after dark, is submitted to the jury under instructions not objected to, due care being defined to be "that kind and degree of care which a

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person of ordinary prudence and care would exercise in the same place, and under the same circumstances, and at the same time," and the jury being also told that "due care depends upon the time, the place, the circumstances, the situation, and everything that may reasonably enter into the transaction and the proper determination of such a question as that," the judge is not bound to give a request that "if you find that the plaintiff received the injuries complained of by reason of the defective condition of the highway in question, and if, in consideration of the circumstances attending the accident and the testimony offered in this case, you find no evidence of fault on his part, then from the mere absence of such evidence you may infer that he was, at the time he received the injuries complained of, in the exercise of due care." *Hilton* v. *Boston*, 478.

See CONSTITUTIONAL LAW, 1; DAMAGES, 1; EMINENT DOMAIN, 2; WRIT OF ENTRY, 1.

HOMICIDE.

See EVIDENCE, 7–9.

HUSBAND AND WIFE.

See ASSIGNMENT, 1–3; EQUITY, 5; ESTATES OF PERSONS DECEASED, 3.

IMPLIED CONTRACT.

See INVENTION, 2, 3.

INCOME.

See ESTATES OF PERSONS DECEASED, 1, 2.

INDEMNITY.

See ACTION, 5; NOTICE, 1.

INDENTURE.

See CONTRACT, 4; DECLARATION, 3, 4; EQUITY, 2; LEASE, 3.

INDICTMENT.

See EVIDENCE, 7–9.

INDORSEMENT.

See BANK, 2; CHECK, 1, 3, 5–9; EVIDENCE, 13; INSOLVENT DEBTOR.

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INFANT.

See ACTION, 6, 7; CONTRACT, 1; INTOXICATING LIQUORS; NEGLIGENCE, 11; QUANTUM MERUIT.

INJUNCTION.

See EQUITY, 1, 4; MUTUAL INSURANCE, 1; TRUST AND TRUSTEE, 8; WAY.

INSANITY.

See GUARDIAN AND WARD, 2, 3.

INSOLVENT DEBTOR.

A., who was in an insolvent condition, on being pressed by a creditor, B., got C., who was in B.'s employ, to indorse, on giving C. security, his (A.'s) note to B. for the debt, and gave C. a mortgage of nearly all his property. C. knew that A. was insolvent, and that A.'s only motive for executing the mortgage, other than that of delaying creditors, which also was avowed by A., was to give further security to B., without receiving any new consideration from him. *Held*, on a bill in equity by the assignees in insolvency of A., brought three months and a half after the date of the mortgage and two months after A. was petitioned into insolvency, that the mortgage was a preference, and that it made no difference that the attempt was in the manner described instead of the more direct one of a mortgage to B. *Saunders* v. *Russell*, 74.

See ACTION, 3; CONVERSION; ESTOPPEL, 2; FRAUDULENT CONVEYANCE; LIFE ESTATE; MUTUAL INSURANCE, 1; RECEIVER; TRUST AND TRUSTEE, 5.

INSTRUCTIONS.

See DAMAGES, 1; DECREE, 1; HIGHWAY; TAX, 2; TRUST AND TRUSTEE, 3.

INSURANCE.

1. A mistake in a proof of loss in regard to the number of the building will not affect the right of the assured to recover if the description of the building corresponded in other respects with that contained in the policy, and there is nothing to show that the insurer was misled or prejudiced by the error. *Faulkner* v. *Manchester Fire Assurance Co.* 349.
2. Where at the trial of an action upon a policy of insurance against loss by fire it is found that the policy had been duly cancelled before the fire occurred, it is unnecessary to decide whether there is evidence tending to show that the defendant waived the provision in the policy in regard to

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arbitration in case the parties were unable to agree as to the amount of the loss. *Faulkner* v. *Manchester Fire Assurance Co.* 349.

3. At the trial of an action upon a policy against loss by fire it appeared that the plaintiff applied for insurance to a broker, who had procured other insurance for him, and who in turn applied to an agent of the company, who issued and delivered a policy to the plaintiff; that subsequently, the defendant having requested its agent to cancel the policy, he went to the broker's office, and, the broker being absent, asked his clerk to get the policy and bring it to him for cancellation, which the clerk did before the fire occurred; that the plaintiff authorized the broker's clerk to deliver up the policy for cancellation, but not until after he should be insured in some other good company to the same amount, but such instructions were not disclosed to the defendant's agent. *Held*, that the policy was duly cancelled before the fire occurred, and that, the broker's clerk being the agent of the plaintiff, the instructions to him, which were not disclosed to the defendant's agent, could not affect the validity of the cancellation. *Ibid.*

4. A., who did business in Maryland, requested B., an insurance broker in New York, to procure insurance for him on certain property, and B. requested C., another broker in New York, to obtain such insurance for A. in a mutual insurance company organized under the laws of, and doing business in, this Commonwealth, but not authorized to do business in Maryland or in New York. C. sent an application for the insurance to D., the manager of the company here, which was accepted by the company, and a policy was written here accordingly and sent to C., to whom the premium was charged, he having an open account with D. C. delivered the policy to B., who mailed it to A., by whom a check for the premium was sent to B., who subsequently sent to C. a check payable to the order of the company for the premium, which was mailed to D. C. was paid by D. a commission for his services out of the commission allowed D. by the company, and B. was paid by A. for his services. *Held*, that C. must be regarded as the agent of A.; and that the contract contained in the policy was a Massachusetts contract. *Commonwealth Mutual Fire Ins. Co.* v. *Knabe & Co. Manuf. Co.* 265.

5. The fact that a policy of insurance in a mutual fire insurance company contains terms and conditions not included in the application therefor, if they are not unusual or extraordinary, does not render necessary the acceptance of the policy by the assured in order to make it binding on him, but the contract becomes complete on the delivery of the policy, without any further assent on his part. *Ibid.*

6. An insurance company may waive the payment of the premium in cash upon delivery of the policy, and the policy will then take effect as if it contained no provision requiring such payment. *Ibid.*

7. A policy of marine insurance, issued under an agreement with the assured by which all merchandise belonging to him shall be insured from the moment that it becomes his property in a certain place until forty-eight hours after the discharge of the vessel in the port of delivery, although, while the rate of premium is fixed, the exact amount of the insurance and of the premium cannot be known until the receipt of the invoice, which

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sometimes is not until several days after the arrival of the vessel, is a contract for "specific insurance" on each cargo. *Peabody* v. *Liverpool & London & Globe Ins. Co.* 114.

See ASSIGNMENT; BENEFICIARY ASSOCIATION; CONDITION; DECLARATION, 2; MUTUAL INSURANCE; NOTICE, 2; PRIORITY.

INTEREST.

Interest upon interest cannot be recovered simply on the strength of a demand. *Lewin* v. *Folsom*, 188.

See ASSIGNMENT, 4; CONTRACT, 2; DAMAGES, 3; DEVISE AND LEGACY, 5; EMINENT DOMAIN, 1; EXECUTOR; MORTGAGE; PARTNERSHIP, 2; POWER, 2; RECEIVER, 3.

INTERROGATORIES TO ADVERSE PARTY.

It seems that, in an action against a railroad corporation for the death of an employee, its president may be ordered to answer interrogatories propounded under Pub. Sts. c. 167, §§ 49 *et seq.*, which he refuses to answer on the ground that he has no personal knowledge of the subjects of inquiry, the interrogatories being otherwise unobjectionable; and the fact that testimony is introduced at the trial referring to many, if not all, of the matters referred to in the interrogatories does not cure the error in refusing to order them to be answered. *Gunn* v. *New York, New Haven, & Hartford Railroad*, 417.

INTOXICATING LIQUORS.

The declaration in an action of tort brought to recover the penalty imposed by Pub. Sts. c. 100, § 24, for selling or giving intoxicating liquors to a minor, is not demurrable on the ground that it alleges that the defendant, by himself, his agent or servant, did sell or give, etc., and thus leaves it uncertain whether a sale or gift is alleged, and by whom; and the action, when brought by the father, at least, is not affected by the emancipation of the minor before the sale, or by the fact that it was brought after he had come of age. *Hamer* v. *Eldridge*, 250.

INVENTION.

1. Before the granting of a patent an inventor has a qualified property in his invention which is assignable, and which may have a value and serve as a consideration for a promise to pay for a transfer and sale. *Burton* v. *Burton Stock Car Co.* 437.
2. A license to use an invention may be given before the granting of a patent therefor, and, if acted on by applying the invention to machines or mechanisms constructed before the granting of the patent, will avail to protect the licensee in their use afterwards. Such license, and an implied promise to pay reasonable compensation therefor, may be inferred from circumstances. *Ibid.*

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3. Evidence that the plaintiff's brother, who was a director and officer of a corporation employing the plaintiff, was aware of the use by the corporation of the plaintiff's inventions and of his claim for reasonable compensation for their use; that officers of the corporation wrote to and talked with the plaintiff with reference to such use and claim; that directors of the corporation knew that it was using his inventions and that he would claim compensation therefor; that the plaintiff, at the request of officers of the corporation, while still in its employ, assigned to it his patents afterwards obtained for the inventions and was paid the expense of perfecting the inventions and procuring the patents; and that the plaintiff then asserted that he did not waive his right to royalty for the former use of the inventions, but should insist upon future payment, and was assured that his claim would be adjusted later, will warrant the inference, in an action against the corporation, of an implied promise to pay compensation for the use of his inventions, in the absence of evidence that he agreed to license such use gratuitously. *Burton* v. *Burton Stock Car Co.* 437.

See AUDITOR, 2; EVIDENCE, 31–33.

JUDGE.

See ADOPTION, 2; AUDITOR, 1; CONVERSION; DAMAGES, 3; DECLARATION, 4; DIVORCE; EQUITY, 9–11; EVIDENCE, 29, 32; EXCEPTIONS, 3; MASTER AND SERVANT, 4; NEW TRIAL; NULLITY OF MARRIAGE, 2; PRINCIPAL AND AGENT; TRIAL; TRUST AND TRUSTEE, 1; WRIT OF ENTRY, 1, 2.

JUDGMENT.

See ACTION, 5; APPEAL, 2, 3; EQUITY, 1, 3; ESTOPPEL, 2; GUARDIAN AND WARD, 1; NOTICE, 1; OFFICER; WRIT OF ERROR.

JURISDICTION.

See APPEAL, 4; EMINENT DOMAIN, 2; EQUITY, 7; OFFICER; TAX, 2.

JURY.

See CONDITION, 2; CONTRACT, 1; DAMAGES, 1, 6, 7; DURESS; EMPLOYERS' LIABILITY ACT, 7, 10; EQUITY, 10; EVIDENCE, 7, 19, 33; EXCEPTIONS, 1; FALSE RETURN; FRAUDS, STATUTE OF, 4; GOODS SOLD, 1; GRAND JURY; MASTER AND SERVANT, 1, 2; NEGLIGENCE, 2, 5; PROMISSORY NOTE; QUANTUM MERUIT, 1; TRIAL, 2.

LANDLORD AND TENANT.

1. Whether a tenant at sufferance is entitled to a reasonable time to remove his goods after a notice to quit from his landlord, a ruling to that effect is not required in an action by the tenant against the landlord for conversion

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of the tenant's goods which the landlord has removed, if the judge cannot, as requested, rule, as matter of law, that the time which elapsed between the notice and the removal was not a reasonable time. Where the facts are not disputed, what is reasonable time is a question for the court. *Lash* v. *Ames*, 487.

2. A landlord is entitled, at least after the lapse of a reasonable time from the giving to a tenant at sufferance of a notice to quit, if the tenant does not remove his goods, to remove them himself, and, having offered to take them where the tenant wishes, and received no directions in the matter, if he stores them subject to the tenant's order he is not liable to an action for conversion of the goods. *Ibid.*

See ACTION, 5; LEASE; PRINCIPAL AND AGENT.

LARCENY.

See EVIDENCE, 7.

LAW AND FACT.

See ARBITRAMENT AND AWARD; CONDITION, 2; CONTRACT, 1; DAMAGES, 2, 6; DIVORCE; DURESS; EMPLOYERS' LIABILITY ACT, 7; EQUITY, 9, 10; EXCEPTIONS, 1; FALSE RETURN; GOODS SOLD, 1; LANDLORD AND TENANT, 1; MASTER AND SERVANT, 2, 3; NEGLIGENCE, 2, 5, 11; PARTNERSHIP, 3; PAYMENT; PROMISSORY NOTE; QUANTUM MERUIT, 1; WRIT OF ENTRY, 2.

LEASE.

1. Evidence tending to show an agreement between the lessor and the lessee, outside of the lease, that a building on the premises should be and remain the personal property of the lessee, is rightly admitted; and such agreement is not inconsistent with a phrase following the description of the land, "to be occupied by a building erected thereon by said R.," the lessee, or with a covenant that at the termination of the lease the lessee should deliver up the premises in as good order and condition as they then were or should be put into by the lessor. *Ryder* v. *Faxon*, 206.
2. Where a lease itself shows the lessor's assent that the lessee should erect a building, evidence that the lessor directed that it should be so built that it could be moved when the lease expired, that he made no reply when told by the lessee that he would have to mortgage the building to pay for it, and that the lessor told the lessee that he did not want him to put up any wall or anything that would obstruct the place, justifies a finding that there was an agreement that the building should be the personal property of the lessee. *Ibid.*
3. An indenture of lease, executed by two railroad corporations, contained the following clause: "The lessor doth hereby grant, demise, and lease unto the lessee its railroad and railroad property of every description, both as the same now exists and it shall exist after the location, construction,

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completion, and equipment of said railroad from C. to N. as herein provided, and the location, construction, and equipment of said branch or extension of said railroad as above specified, including therein its railroad, lands, and all real estate, rights, and appurtenances connected therewith, within this Commonwealth; also all branches, tracks, side tracks, and the land on which the same are located, road-beds, superstructure, gravel pits, station-houses, depots, viaducts, bridges, piers, wharves, shops, buildings, fixtures, water tanks, engines, tools, cars, rolling stock, machinery, furniture, telegraph apparatus, poles, and equipments of every kind, material and supplies, and all personal property and estate owned by said lessor; also all rights, franchises, and easements, privileges, and appurtenances belonging to said lessor in connection with said railroad, together with the right to fix, demand, and receive all tolls, rent, revenue, income, and profits of the demised railroad and premises, and the right to run, manage, and control the same, subject to the provisions of its charter and of the laws of this Commonwealth." *Held*, that the right which the lessor had in a fund received by the trustees under a mortgage of the railroad property given by its predecessor to secure the payment of bonds, from a committee of the bondholders purchasing at a foreclosure sale, passed to the lessee under the clause above quoted. *Gray* v. *Central Massachusetts Railroad*, 116.

See ACTION, 5; DECLARATION, 3, 4.

LEGACY.

See DEVISE AND LEGACY.

LEX LOCI.

See CONFLICT OF LAWS; INSURANCE, 4.

LICENSE.

See INVENTION, 2, 3; MUTUAL INSURANCE, 2.

LIEN.

See MECHANIC'S LIEN.

LIFE ESTATE.

Land was given by will to A. for life, he to pay all taxes thereon, with remainder to his brother contingent upon his leaving no issue. A. became insolvent, and his assignees conveyed their title to his wife, who took possession of the land, and then conveyed it to her son, but retained possession, receiving the rents and profits and paying the taxes. Subsequently she took a conveyance of the land from the purchaser at a sale for nonpayment of taxes assessed thereon prior to A.'s insolvency, and later took

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a reconveyance from her son. *Held*, that she did not acquire an estate in fee by her acts; and that the contingent remainder in A.'s brother was protected by Pub. Sts. c. 126, § 8. *Ritchie* v. *Ritchie*, 504.

See DEVISE AND LEGACY, 1, 2, 6, 7; POWER, 1.

LIFE INSURANCE.

See ASSIGNMENT; PRIORITY.

LIMITATIONS, STATUTE OF.

See ATTORNEY AT LAW; ESTATES OF PERSONS DECEASED, 2.

MALICIOUS PROSECUTION

See EVIDENCE, 10.

MARINE INSURANCE.

See INSURANCE, 7.

MARRIAGE.

See DIVORCE; NULLITY OF MARRIAGE.

MASTER AND SERVANT.

1. The contention of the plaintiff, in an action at common law for personal injuries, that the fact that his fellow workman held with the tongs over a forge fire a stick of frozen dualin in order to thaw it, would of itself justify the jury in finding that the fellow workman was an unsuitable person for the defendant to have in his employ, and that therefore the case should have been submitted to the jury, cannot avail, if it appears that the fellow workman was employed only as a common laborer, that the work for which he was employed had nothing to do with the handling or use of explosives, and that, while it was careless to send an ignorant common laborer to thaw out dualin, the act was not an act of the defendant or of a superintendent, but of another fellow workman, who was working in the trench with the other workmen, and was merely acting as foreman in the absence of the superintendent. *McManus* v. *Staples*, 150.
2. An employee in a shoe factory, who, in going from the floor on which he works to the engine-room on the floor below to get some oil for the machine of which he has charge, is injured by falling through an open trap-door in a dark passageway leading to the engine-room, of the existence of which he is ignorant, although he has worked there about four weeks, and used the passageway daily, and is walking quickly without looking at the floor, is entitled, in an action against his employer for his

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injuries, to go to the jury upon the questions of his due care and his employer's negligence. *Johnson* v. *Field-Thurber Co.* 481.

3. It cannot be ruled, as matter of law, in an action for personal injuries occasioned to the plaintiff while in the defendant's employ, by falling through an open trap-door left unguarded by a fellow servant who opened it, that the latter was negligent, if it does not appear that any guards were furnished by the defendant. *Ibid.*

4. In an action for personal injuries occasioned to the plaintiff while in the defendant's employ as a salesgirl, it appeared that she had been sent up stairs to a room in a new part of the shop, to which the public had not had access; that on her return she took a different way from that by which she went, and started down a winding staircase which also was not open to the public at the time; that the stairs were new and had been treated with oil or shellac; that to protect them while drying a loose piece of pasteboard had been placed upon each step, not covering it quite equally, the step not being of equal width throughout; that the plaintiff tripped or slipped on one of the pieces of pasteboard when part way down the stairs, fell, and broke her ankle; and that the staircase was light, and she understood the arrangement and its purpose. *Held*, that the defendant was not guilty of any breach of duty, and that the presiding judge rightly directed a verdict for the defendant. *McIntire* v. *White*, 170.

5. A boy, who had had two years' experience in riding colts which were being trained, was injured by the breaking of a stirrup strap on the saddle which he was using when so employed. In an action against his employer for his injury, he testified that, when he went to work, A., the defendant's foreman, handed him a saddle on which the stirrup strap was too short; that he called A.'s attention to this, and A. said, "Here is a pair of old stirrup straps hanging in the case that you will have to use," taking them down and handing one to the plaintiff, who noticed a bad place in it, and told A. that it did not look right; that A. took it out of his hand, got hold of it and pulled it; that he then put it on the floor and pulled it up, and said it was strong enough to hold him, and that it had got to hold the plaintiff until he got a new one; that the plaintiff believed the strap was strong enough after A. tested it and told him it was strong enough; and that he used it several days, when it broke at the point to which A.'s attention had been called. *Held*, that the plaintiff assumed the risk of using the strap in the condition in which it was; and that the action could not be maintained. KNOWLTON, J. dissenting. *Davis* v. *Forbes*, 548.

6. An employer is under no legal obligation to furnish his injured employee with medical attendance. *Ibid.*

7. At the trial of an action for personal injuries sustained by the plaintiff while in the employ of the defendant, there was evidence that it was the plaintiff's duty to remove cards, as printed, from a lithographic press, in doing which he sat with his left side toward a revolving cylinder on which the cards were placed, and when the cylinder stopped, as it did automatically after each card was printed, he removed the card, another card was put upon it by another operative, and the cylinder revolved again; that

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the cylinder was covered by an iron mask while revolving, which lifted just long enough for the change of cards and closed again before the new revolution; that the plaintiff's hand was caught by the iron mask as it closed, and was injured; that the plaintiff had formerly used his left hand, that being nearest to the cylinder, to remove the cards until told by the man over him to use his right hand; that in obeying the order he leaned his body more to the left, and in so doing his seat tipped up, threw him against the machine and caused the accident; that the seat was a board four or five feet long, supported by four fixed iron rods fitted loosely into holes on the under side of the board, which rested on them unattached; that the rods were three or four inches from the end of the board nearest the cylinder and the distance between the end of the board and the cylinder was twelve or fourteen inches; and that the plaintiff was ignorant of the tendency of the seat to tip. *Held*, that the defendant was liable at common law. *Spaulding* v. *Forbes Lithograph Manuf. Co.* 271.

See Auditor, 2; Check, 1, 4, 5, 7; Employers' Liability Act; Evidence, 20–24; Interrogatories to Adverse Party; Negligence, 2; Police Officer.

MASTER IN CHANCERY.

See Estates of Persons Deceased, 2; Partnership, 2.

MAXIMS.

"Equality is equity." See *Jones* v. *Arena Publishing Co.* 22, 32.

"Equity follows the law." See *Jones* v. *Arena Publishing Co.* 22, 31.

MECHANIC'S LIEN.

1. The general words of Pub. Sts. c. 191, § 1, do not give a lien for labor upon a schoolhouse held by a town for public school purposes. *Lessard* v. *Revere*, 294.
2. Work done upon a building for the purpose of enlarging the time for filing a claim for a lien, and not *bona fide* for the purpose of carrying out the contract, is not to be considered in fixing the time for the running of the thirty days within which the certificate must be filed. *O'Driscoll* v. *Bradford*, 231.
3. At the trial of a petition for the enforcement of a lien on buildings and land, it appeared that the petitioner was employed by a sub-contractor to plaster the house and build the chimneys; that the petitioner substantially finished his work on May 20, at about which time the original contractor and sub-contractor abandoned their contracts; and that subsequently, on July 18 and 22, the petitioner patched some plastering in the house where it had been disturbed by joiners in putting on the finish. *Held*, that labor furnished after May 20 was not furnished

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under a contract made with the consent of the respondent, and that a certificate which was not filed until August 11 was not seasonably filed. *O'Driscoll* v. *Bradford*, 231.

MILITIA.

Certiorari will not lie to correct the proceedings of the board of examiners acting under § 64 of St. 1893, c. 367, entitled "An Act concerning the volunteer militia." *Devlin* v. *Dalton*, 338.

MINOR.

See ACTION, 6, 7; CONTRACT, 1; INTOXICATING LIQUORS; NEGLIGENCE, 11; QUANTUM MERUIT.

MISTAKE.

See INSURANCE, 1; TRUST AND TRUSTEE, 1; WILL, 4.

MORTGAGE.

A mortgage was given upon a building partially erected, and the mortgagee advanced at the time of taking the mortgage a part only of the consideration named in the mortgage. The mortgagor agreed to complete the building before a certain date; and it was further agreed between the parties that if the work on the building should not be completed by the time agreed, the mortgagee might take charge of and complete the work, and that all sums so expended should be considered a part of the balance to be advanced on account of the mortgage. The mortgagee agreed to pay the balance of the loan thirty-five days after the completion of the building, provided there were no liens, etc.; and the mortgagor by his own fault did not complete the building within the required time, and the mortgagee did not take charge of or complete the work, and was not asked to, and did not offer to advance the balance of the mortgage, though he was always ready and able to advance the balance upon the completion of the building according to the agreement. *Held*, that the mortgagee was not entitled to interest on the money not advanced. *Lewin* v. *Folsom*, 188.

See ACTION, 3; APPEAL, 4; FORECLOSURE; INSOLVENT DEBTOR; LEASE, 3; TAX, 3; TRUST AND TRUSTEE, 8, 9.

MOTION TO AMEND.

See DECLARATION, 4.

MUNICIPAL CORPORATION.

See CITY; TOWN.

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MUNICIPAL COURT.

See APPEAL, 2, 3; DISCONTINUANCE.

MURDER.

See EVIDENCE, 7–9.

MUTUAL INSURANCE.

1. The rights of all parties to share in the assets of an insolvent mutual fire insurance company are fixed as of the date of the filing of the bill in equity enjoining it from further proceeding with its business. *Merrill* v. *Commonwealth Mutual Fire Ins. Co.* 81.
2. It is no defence to an action for the amount of an assessment levied under St. 1894, c. 522, §§ 47–49, upon a policy holder in a mutual fire insurance company, that he did not receive notice, which was addressed to him at the town where the insured property was situated, of the hearing before the auditor, the decrees of this court ordering and confirming the assessment having been made after due publication of notice; nor that the amount of the entire assessment was larger than was necessary; nor that the company was not licensed to do business by some of the States in which it incurred losses. *Commonwealth Mutual Fire Ins. Co.* v. *Wood*, 484.

NEGLIGENCE.

1. A person who runs across a railroad track from the station to the opposite platform on the walk provided for passengers, in front of an approaching train, which is in plain sight and which he must see, and by which he is struck and injured, is not in the exercise of due care. *Young* v. *New York, New Haven, & Hartford Railroad*, 33.
2. In an action against a railroad corporation, under Pub. Sts. c. 112, § 212, for causing the death of a person who was a passenger, there was evidence tending to show that he crossed a railroad track from the station to the opposite platform on the walk provided for passengers in order to take an approaching train for Boston; that the platform was narrow and the space insufficient for the accommodation of passengers who were accustomed to use it in taking trains; that on this occasion the platform was crowded with passengers who intended to take the train; that he got one foot on the platform when he was struck by the train, being somewhat obstructed by the crowd, and but for the crowd might perhaps have saved himself; that the platform was so constructed that the locomotive and cars running on the track next to it overhung the edge of the platform; and that the approaching train was running at an extraordinary rate of speed up to and beyond the walk referred to. There was also evidence tending strongly to show that he had not abandoned his intention of taking the train and of proceeding in it. *Held*, that the intestate was a passenger within the

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meaning of the statute, and that there was evidence for the jury of the negligence or carelessness of the corporation, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business. *Young* v. *New York, New Haven, & Hartford Railroad*, 33.

3. In an action under Pub. Sts. c. 112, § 212, the plaintiff is bound to show that the deceased was in the exercise of due care, and that the accident happened through the negligence of the defendant or the unfitness or negligence of its servants; and an action cannot be maintained where it is only a matter of conjecture whether a person killed while attempting to drive over a crossing in front of an approaching train looked or listened, before crossing, or took any precautions to ascertain whether a train was approaching, or whether his view was obscured, or he was misled by the lack of signals or warning by the gateman. *Walsh* v. *Boston & Maine Railroad*, 52.
4. In an action under Pub. Sts. c. 112, § 213, the plaintiff is not obliged to show that the deceased was in the exercise of due care, but he is entitled to recover if it appears that the defendant neglected to give the signals required by law, and that such neglect contributed to the injury; and the burden is on the defendant to show that the deceased was guilty of gross or wilful negligence. *Ibid.*
5. Where a person, in going from the sidewalk of a street towards a street car to get upon it after dark, is injured by falling into a trench between the curbstone and the railway track made for the purpose of laying water pipes, if, in an action for his injury, there is evidence tending to show that the excavation was insufficiently lighted and proper barriers were not maintained, the question of his due care is for the jury. *Fox* v. *Chelsea*, 297.
6. If a person, in going from the sidewalk of a street towards a street car to get upon it after dark, is injured by falling into a trench between the curbstone and the railway track made for the purpose of laying water pipes, the city, in an action against it for the injury, is not entitled to have the jury instructed that "only those using streets for legitimate purposes, in the usual and ordinary mode, can claim indemnity for injuries caused solely by defects in highways," and that, if the plaintiff, at the time of his injury, was using the street in an extraordinary mode, the action could not be maintained. *Ibid.*
7. In an action for personal injuries received, in going from the sidewalk of a street towards a street car to get upon it after dark, by falling into a trench between the curbstone and the railway track, made for the purpose of laying water pipes, the judge refused to instruct the jury, as requested by the defendant, that if the jury found that the plaintiff "received the injuries complained of while voluntarily attempting to pass over a dangerous place, knowing it to be dangerous, or which, by the exercise of ordinary prudence," he "ought to have known to be dangerous, those facts would be conclusive evidence of want of due care on his part"; and instructed them that, if the plaintiff knew that the trench was there, and voluntarily walked into it, he could not recover. *Held*, that the defendant had no ground of exception. *Ibid.*
8. In an action against a city for personal injuries received, in going from the sidewalk of a street towards a street car to get upon it after dark, by

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falling into a trench between the curbstone and the railway track made for the purpose of laying water pipes, the defendant is not entitled to have the jury instructed that, "where barriers have been placed by a city along and about a trench dug in its street, to guard it against travellers falling into the trench, and have been removed by a stranger during the night, and during that night, and before the city has any knowledge or notice of such removal, a traveller on the street walks or falls into the trench" and is injured, he cannot maintain an action against the city. *Fox* v. *Chelsea*, 297.

9. In an action against a railroad corporation for personal injuries received by the plaintiff while a passenger on the defendant's train at H., there was evidence that when he started on his journey he was in perfect health, and that he had always been in good health previously. There was testimony from numerous witnesses tending to show that he was in a peculiar mental condition at H. He had a wound on his hand, and one or two slight bruises on his head. The physician who attended him there testified that he was weak, trembling, nauseated, and in a cold perspiration, his pulse slow, and the pupils of his eyes were unusually dilated; that he seemed dazed, and refused to give his name. The evidence tended to show that his subsequent physical and mental condition was such that, at the time of the trial, it would have endangered his life to leave home and come to court; and that, if he could have been present, it would have been impossible for him to testify. *Held*, that the evidence warranted a finding that the plaintiff's condition was caused by an injury received at the time of the accident. *Copson* v. *New York, New Haven, & Hartford Railroad*, 233.

10. An inference of due care on the part of the plaintiff in an action for personal injuries received in a railroad accident is justified from evidence of the conductor of the train on which the plaintiff was a passenger, that he went through the train and took up the tickets of the passengers seven times between the station where the plaintiff entered the train and the place of the accident, that all the passengers had paid their fares before the accident, and that he did not remember seeing the plaintiff. *Ibid.*

11. In an action for personal injuries there was evidence tending to show that the plaintiff, a girl twelve years of age, entered the carpenter shop of the defendant to purchase a basket of wood; that she paid five cents to one of the defendant's workmen, and entered a bin having a wall three feet high partly filled with wood, by a step which she had been in the habit of using whenever she bought wood at the shop, for the purpose of filling her basket; that while in the bin one of the defendant's men placed boards across the top of the bin so as to obstruct the plaintiff's access to the step by which she had entered the bin; that she left the bin by climbing over one of the other walls, near which was a table containing a revolving knife extending about a sixteenth of an inch above its surface, which in rapid motion might look as if it were at rest, and in so doing rested her hand upon the revolving knife and was injured; and that the way she got out seemed to the plaintiff the easiest after the boards were put on the bin. *Held*, that it could not be said, as matter of law, upon

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undisputed facts, that the plaintiff was careless, or that the defendant was free from fault in allowing her under such circumstances to get out by a way which exposed her to injury. *Doherty* v. *McLean*, 399.

12. Although a railroad corporation is negligent in storing oil on the platform of its freight house in a town, it is not liable for the loss of adjacent buildings by fire caused by the careless act of a person not in its employ and rightfully on its premises, and which ignites the oil and spreads to the buildings. KNOWLTON, J. dissenting. *Stone* v. *Boston & Albany Railroad*, 536.

13. At the trial of an action of tort to recover the value of a building destroyed by fire communicated by one of the defendant's locomotives, there was evidence tending to show that when the engine passed the building, which stood close to the track, it was throwing smoke and sparks, and the wind was blowing across the track toward the building; that shortly afterward fire was discovered, and was first seen in some hay in the basement of the building under a broken window which was in the side of the building next to the track; that there had been no fire in the office or the engine-room of the building for several days previous; and that the locomotive was equipped with a spark arrester and a netting in the smokestack, and was not known to be a spark thrower. *Held*, that the evidence warranted a finding that the fire was communicated by the locomotive. *Wild* v. *Boston & Maine Railroad*, 245.

14. The owner of a building in which hay is stored, who suffers a window on the side of the building parallel with and near to a railroad track to remain broken for two or three days, cannot be held guilty of such contributory negligence as to preclude his right to recover damages for the loss of the building by fire set by a spark which flew into the window from a passing locomotive. *Ibid.*

See ACTION, 4-7; ATTORNEY AT LAW; CITY; CONFLICT OF LAWS, 2; DAMAGES; EMPLOYERS' LIABILITY ACT; EVIDENCE, 18-24; FENCE; HIGHWAY; INTERROGATORIES TO ADVERSE PARTY; MASTER AND SERVANT; OFFICER; PASSENGER.

NEGOTIABLE INSTRUMENTS.

See BANK; CHECK; EVIDENCE, 11, 13; PROMISSORY NOTE.

NEW TRIAL.

An order overruling a motion for a new trial is within the discretion of the judge, and is not a subject for an exception. *Fox* v. *Chelsea*, 297.

NOTICE.

1. Where a defendant proposes to look to a person who is liable to recompense him if he should be beaten in an action, the notice, in order to make the judgment binding on that person, must be such in substance as to give the person notified information that he is called upon to come in

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and defend the action, or that he is given an opportunity so to do, and that if he does not defend it he will be held responsible for the result. *Consolidated Hand-Method Lasting Machine Co.* v. *Bradley*, 127.

2. Where a policy of insurance against loss from liability to employees injured in the course of their employment contains a proviso that the assured shall give the company "immediate written notice" of the happening of an accident within its terms, a notice of such accident given twenty-six days after it occurred is not a compliance with the condition, and the fact that the intention of the assured to send notice was interrupted by a strike of his employees, which gave him a great deal of trouble, and caused him for the time to forget the notice, is not an excuse for not complying with the condition of the policy. *Smith & Dove Manuf. Co.* v. *Travelers' Ins. Co.* 357.

See CHECK, 6; CONSTITUTIONAL LAW, 2; CONTRACT, 3; FORECLOSURE; GUARANTY, 2; GUARDIAN AND WARD, 3; MUTUAL INSURANCE, 2; SEWER; TRUST AND TRUSTEE, 8; WAIVER, 1.

NOTICE TO QUIT.

See LANDLORD AND TENANT.

NULLITY OF MARRIAGE.

1. Section 10 of c. 145 of the Public Statutes, which declares that, when persons resident in this Commonwealth, in order to evade the provisions of certain statutes as to prohibited marriages, and with an intention of returning to reside in this Commonwealth, go into another State or country, and there have their marriage solemnized, and afterwards return and reside here, the marriage shall be deemed void in this Commonwealth, requires that both parties should have the intention to evade the provisions of the statute. *Whippen* v. *Whippen*, 560.

2. It is within the power of a judge of the Superior Court to enter a decree for a libellant, under Pub. Sts. c. 145, § 11, declaring the marriage void, where it appears that the libellant, soon after the ceremony and before the consummation of the marriage, on learning that the respondent was afflicted with a venereal disease, refused to live with and never did live with him, and the judge finds that he was constitutionally afflicted with syphilis, with which the libellant would become infected in case of cohabitation, and "that the disease would be transmitted to any offspring which they might have; that, while it was not absolutely incurable, the chances of a cure being effected in the state in which the respondent was were very remote and doubtful." *Smith* v. *Smith*, 404.

OFFICER.

In an action against an officer to recover damages for neglect to arrest a person on an execution, it is open to the defendant to prove that the judgment and execution were void. *Belcher* v. *Sheehan*, 513.

See EVIDENCE, 9; POLICE OFFICER.

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ORDINANCE.

See ACTION, 4.

PARENT AND CHILD.

See ADOPTION; CONTRACT, 1; EVIDENCE, 3; INTOXICATING LIQUORS.

PARTIES.

See CONTRACT, 1; EQUITY, 6, 7; GOODS SOLD; GUARDIAN AND WARD, 1, 2.

PARTNERSHIP.

1. An attorney at law, who is a member of a partnership of lawyers, has no implied authority by reason of the partnership to borrow money on the credit of the partnership, or to sign or indorse a negotiable promissory note in the name of the partnership; and it is immaterial that the money borrowed by him is used to pay the regular and ordinary expenses of the partnership, or that the holder of the note is a *bona fide* purchaser for value before maturity; and an action by such holder against F., the partner who denies any knowledge of the making and indorsement of the note, and the authority of K., the copartner, to use the firm name in indorsing the note, cannot be maintained if there is no evidence that F. gave K. such authority, or that F. was estopped by his conduct from denying K.'s authority, or that he had ratified what K. had done. *Worster* v. *Forbush*, 423.
2. Where, in a suit for an accounting, the testimony of the surviving partner on his contention that he is entitled to interest on a certain share of the partnership assets is discredited by the master, if there is nothing to outweigh the master's finding and the accounts, a decree is properly entered for the administrators of the deceased partner. *Lockwood* v. *Roberts*, 109.
3. It is not an absolute rule of law that a surviving partner has no right to turn over merchandise of the late firm to a new firm of which he is a member, to be sold under commission by the latter, and that the commission charged, or at least the surviving partner's share, should not be allowed in the account between him and the executor of his deceased partner. *Thayer* v. *Badger*, 279.

PASSENGER.

Evidence that the plaintiff in an action for personal injuries occasioned by a railroad accident went with a witness to take a train at a station on the defendant's railroad, that the witness did not see the plaintiff get on the train, as he was fifty or a hundred feet from him, but saw him "getting hold of the last rail of the car, and he must have got on the train," and

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"after the train had gone he looked to see whether he was there and did not see him," and that within a few minutes after the accident, which happened to the train about an hour later at another station, he was seen at the latter station by several passengers, will warrant a finding that the plaintiff was a passenger on the train at the time of the accident. *Copson* v. *New York, New Haven, & Hartford Railroad*, 233.

See NEGLIGENCE, 1, 2, 9, 10.

PATENT.

See EVIDENCE, 33; INVENTION.

PAYMENT.

It cannot be said, as matter of law, that a promissory note given for the amount of a debt has been paid by the giving of a second note, but whether the latter operated as such payment is a question of fact depending on the intention of the parties and the other circumstances attending the transaction. *Kendall* v. *Equitable Life Assurance Society*, 568.

See ACTION, 3; BANKRUPTCY; CHECK, 3, 4, 7; INSURANCE, 6; POWER, 2; PRIORITY; QUANTUM MERUIT.

PENALTY.

See INTOXICATING LIQUORS.

PERPETUITY.

While a testamentary provision for the preservation, adornment, and repair of a private monument may be void as creating a perpetuity for a use not charitable, a provision which will be completely performed upon the decease of the testator's widow is not open to that objection. *Leonard* v. *Haworth*, 496.

PERSONAL PROPERTY.

See CONVERSION; DEVISE AND LEGACY, 6, 7; EVIDENCE, 2; LEASE, 1; RECEIVER, 2; TAX, 2, 3; WILL, 1, 2, 4.

PHOTOGRAPH.

See EXCEPTIONS, 2.

PHYSICIAN.

See DAMAGES, 5, 7; EVIDENCE, 25.

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PLAN.

See EVIDENCE, 6; TOWN, 8.

PLEADING.

See DECLARATION; FRAUDS, STATUTE OF, 4; INTOXICATING LIQUORS; QUANTUM MERUIT.

PLEDGE.

See ASSIGNMENT, 2-4; SALE.

POLICE COURT.

See EVIDENCE, 1.

POLICE OFFICER.

The St. 1878, c. 244, § 6, does not make a special police officer the servant of the person at whose request he is appointed. *Healey* v. *Lothrop*, 263.

POOR DEBTOR.

See ESTOPPEL, 2.

POWER.

1. Where the power to sell real estate is given to trustees by will for the purpose of changing investments of the trust property and of performing the duties of the trust, when the trust terminates by the death of the life tenant this power ceases to exist. *Heard* v. *Read*, 374.
2. On a bill in equity for instructions, brought by trustees under a trust deed of H., it appeared that the deed gave property in trust to the use of such persons and corporations as H. might appoint by will; that H. died on February 9, 1895, and by his will and codicil appointed legacies to different persons and corporations, and the residue to the M. Society; that the will and codicil were proved after a contest on May 17, 1897, and that then there was a contest whether the property was assets to be administered by H.'s executor, or was to be distributed by the plaintiffs, which was decided for the plaintiffs on January 25, 1898, and on February 5, 1898, the legacies other than the residue were paid. The words in the trust deed were "upon and after the death of said H. then in trust to hold the said trust property" to the use of the appointees, and "the trustees shall take such time, not exceeding three years from the death of H., as they may think best, for the most judicious conversion of the trust estate and to

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prevent the sacrifice thereof." *Held*, that the appointees were to be treated as if they had been entitled to be paid at H.'s death, and that they must be be paid interest from that date. *Loring* v. *Massachusetts Horticultural Society*, 401.

See DEVISE AND LEGACY, 5; TAX, 1; TRUST AND TRUSTEE, 5.

PRACTICE.

See APPEAL; ARBITRAMENT AND AWARD; AUDITOR, 1; BANKRUPTCY; CONTRACT, 2; DAMAGES, 3; DECLARATION, 2–4; DISCONTINUANCE; EQUITY, 6–11; ESTOPPEL, 2; EVIDENCE, 17, 28; EXCEPTIONS; FALSE RETURN; FRAUDS, STATUTE OF, 4; GRAND JURY; GUARDIAN AND WARD; INTERROGATORIES TO ADVERSE PARTY; NEW TRIAL; NOTICE, 1; QUIETING TITLE; TRIAL; TRUSTEE PROCESS; WRIT OF ENTRY; WRIT OF ERROR.

PRESCRIPTION.

See DEED, 1; WAY.

PRESUMPTION.

See DEED, 2; DIVORCE.

PRINCIPAL AND AGENT.

In an action by a tenant at sufferance against his landlord for the conversion of goods which, after a notice to quit, the latter removed, the defendant testified that he had several conversations with A., in which A. told him that the occupant of the building was the husband of one of the beneficiaries under a trust held by A., and in order to carry through the sale of the building to the defendant, and get the occupant, who was the plaintiff, to vacate the premises, it would be necessary to pay him a certain sum of money. The plaintiff, when asked, "Then you did authorize A. to deal with the question when you should get out," answered, "Certainly, I ordered him to." He further testified that among the controversies was one about moving out; and that "A. consulted with us all through, and we acquiesced in everything." *Held*, that the judge was warranted in finding that A. acted as the plaintiff's agent; and that the defendant's testimony was rightly admitted in evidence. *Lash* v. *Ames*, 487.

See BROKER; CITY; CONTRACT, 3; EVIDENCE, 14, 16; GOODS SOLD; INSURANCE, 3, 4; PARTNERSHIP.

PRINCIPAL AND SURETY.

See ASSIGNMENT, 1.

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PRIORITY.

1. The date when claims against the Massachusetts Benefit Life Association must have accrued, in order to be entitled to priority of payment, is the date of the filing of the bill in equity by the Attorney General for the winding up of its affairs. *Attorney General* v. *Massachusetts Benefit Life Association*, 193.
2. Cases where death occurred before the date of the filing of the bill in equity by the Attorney General against the Massachusetts Benefit Life Association for the winding up of its affairs, though not allowed or presented to the company before that time, are to be deemed accrued claims within the meaning of St. 1890, c. 421, § 14, which provides that any unexhausted portion of the emergency fund shall be used, "first, in the payment of accrued claims upon certificates or policies, or if insufficient to pay such claims in full, they shall be paid *pro rata*; second, if a balance remain, in the payment of like claims thereafter accruing in the order of their occurrence." *Ibid.*

See RECEIVER, 2, 4.

PROBATE COURT.

See ADOPTION, 2; BOND; DECREE, 2; ESTATES OF PERSONS DECEASED; ESTOPPEL, 1; EVIDENCE, 8; TAX, 2; TRUST AND TRUSTEE, 6.

PROMISSORY NOTE.

A promissory note was signed by M., and made payable after date to the order of E., by whom it was indorsed in blank. The defendant, who was the administrator of M., denied specially in the answer the genuineness of M.'s signature, and demanded that it should be proved, and also alleged that the note was indorsed to the plaintiff, after maturity, without consideration, and was given to E. as an accommodation note, without consideration, by M. The plaintiff testified that the note was delivered to him by E. nearly five years after it was made, and long after its maturity. *Held*, that the same defences were open to the defendant as if the action had been brought by E., that the burden was on the plaintiff to prove the genuineness of the signature, and that the defendant had a right to go to the jury upon the credibility of the evidence introduced by the plaintiff that the signature was genuine. *Sears* v. *Moore*, 514.

See ACTION, 8; ASSIGNMENT, 1, 2; BANKRUPTCY; EVIDENCE, 11; GUARANTY, 8; INSOLVENT DEBTOR; PARTNERSHIP, 1; PAYMENT; RECEIVER, 8; TAX, 8.

PROXIMATE CAUSE.

See DAMAGES, 4, 5; NEGLIGENCE, 12.

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PUBLIC OFFICER.

See Elections; Employers' Liability Act, 2.

PURCHASER IN GOOD FAITH.

See Foreclosure; Partnership, 1.

QUANTUM MERUIT.

1. In an action upon a *quantum meruit* for services, part of which were rendered while the plaintiff was a minor, it is ruled correctly that, as a written agreement under which they were performed, and which was offered in evidence by the defendant, was not in accordance with Pub. Sts. c. 149, relating to the binding of apprentices, it did not bind the plaintiff, and could not affect his right to recover, unless the jury found that, after he became of age, he ratified and confirmed it, which was a question of fact; and that the jury might consider his acts in receiving the money stipulated therein, and all his other acts, as bearing upon that question. *McDonald* v. *Sargent*, 492.
2. A written agreement made by a minor for the performance of services, which he ratifies after he becomes of age, is admissible in evidence in an action upon a *quantum meruit* for his services; and its competency is not affected by the fact that the answer contains a general denial, and alleges payment only. *Ibid.*

QUIETING TITLE.

1. One who has only an easement, and who does not complain that his rights have been interfered with, cannot be compelled, under St. 1893, c. 340, to bring an action at law or a suit in equity to try his alleged right. *May* v. *New England Railroad*, 367.
2. Where it appears that the petitioner was a purchaser of land at a sale on execution against the former owner and received a sheriff's deed, that the time for redemption has expired, that no defect in the proceedings relating to the sale or in the sheriff's deed are shown, and that no conveyance or assertion of claim to the land has been made by the former owner, the petitioner alleging that the former owner has disappeared and that his residence is unknown to the petitioner, who has reason to believe that he will not return, the petitioner's title does not appear to be clouded by an adverse claim or by the possibility of such claim, within the meaning of St. 1893, c. 340, entitled "An Act relative to quieting title to real estate." *Gilman* v. *Gilman*, 46.

RAILROAD.

See Appeal, 4; Constitutional Law; Damages, 2–7; Eminent Domain; Employers' Liability Act, 9, 10; Evidence, 18, 19; Interrogatories to Adverse Party; Lease, 3; Negligence, 1–4, 9, 10, 12–14; Passenger; Trust and Trustee, 9.

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RATIFICATION.

See CHECK, 7; DURESS, 2; EVIDENCE, 14; PARTNERSHIP, 1; QUANTUM MERUIT.

REAL ESTATE.

See DECLARATION, 3, 4; DEED; EASEMENT; EMINENT DOMAIN; EQUITY, 2, 5, 9; ESTOPPEL, 1; EVIDENCE, 4, 28, 29; FENCE; FORECLOSURE; FRAUDS, STATUTE OF, 3; LANDLORD AND TENANT; LEASE; LIFE ESTATE; POWER, 1; QUIETING TITLE; TAX, 2, 3; TRUST AND TRUSTEE, 8; WRIT OF ENTRY.

REASONABLE TIME.

See LANDLORD AND TENANT.

RECEIPT.

See CHECK, 8; SALE.

RECEIVER.

1. Upon a bill in equity for the appointment of a receiver to take possession of the property of a corporation and distribute its funds among its creditors, the court, without intending to prescribe a fixed rule, adopted the date of the appointment of the receiver for adjusting the rights of the parties on the ground that it would be fairer than the date of the filing of the bill. *Jones* v. *Arena Publishing Co.* 22.
2. Upon a bill in equity, brought before the enactment of St. 1897, c. 400, for the appointment of a receiver to take possession of the property of a corporation and distribute its funds among its creditors, unpaid taxes on the personal property assessed prior to the receivership, and debts due to operatives, clerks, and servants for labor prior to the receivership, are entitled to priority. FIELD, C. J., ALLEN & MORTON, JJ., dissenting. *Ibid.*
3. Upon a bill in equity for the appointment of a receiver to take possession of the property of a corporation and distribute its funds among its creditors, the business having gone on in good faith and without being in any way affected by the pendency of the bill until the appointment of the receiver, notes given in the prosecution of the business up to that time should be allowed whenever they mature, with the addition or rebate of interest as in insolvency proceedings. *Ibid.*
4. Upon a bill in equity for the appointment of a receiver to take possession of the property of a corporation and distribute its funds among its creditors, there is no reason why a claim should have priority, the work for which priority of payment is claimed having been done in pursuance of a contract with the corporation made before the filing of the bill, and not at the request of the receiver nor for the purpose of aiding the court either in keeping the business alive or administering the assets of the corporation. *Ibid.*

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RECOGNIZANCE.

See ESTOPPEL, 2; FALSE RETURN.

RECORD.

See EVIDENCE, 1.

REDEMPTION.

See ASSIGNMENT, 2, 4; QUIETING TITLE, 2; TRUST AND TRUSTEE, 8.

REGISTRAR OF VOTERS.

See ELECTIONS.

RELEASE.

See ATTORNEY AT LAW.

REMAINDER.

See LIFE ESTATE.

RENT.

See DECLARATION, 3; DEVISE AND LEGACY, 2, 3.

REPLEVIN.

See CONTRACT, 4.

REPORT.

See APPEAL, 1; ARBITRAMENT AND AWARD; AUDITOR; EVIDENCE, 5, 6; TOWN, 3.

RESTRAINT OF TRADE.

H., M., and R., each of whom was the business manager of a corporation and a shareholder therein, on September 29, 1894, agreed in writing to form a new corporation, of which they were to be officers and directors. Each corporation was to sell its assets and good will to the new corporation, and each of these persons was to take one third of the capital stock of the new corporation and devote himself unreservedly to its interests. There was also a stipulation as to salaries, the allowance for assets of the three corporations, and as to the agreement being binding on approval of a majority of the shareholders or boards of directors of the three corporations. The

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A. Company was duly incorporated in accordance with the contract. On October 12, 1894, a written agreement was made between the A. Company and the other three corporations, whereby the assets and good will of the three were transferred to the A. Company, and the three agreed to discontinue business. The agreement, which was signed by each of the four corporations and by their officers, H., M., and R., contained the following stipulation: "6. It is further agreed by all the persons whose names are set hereunder, officers of the corporations herein above described, that they will not hereafter at any time, directly or indirectly, as partner, agent, officer of a corporation, or in any other wise, enter into or conduct or assist in conducting any business that shall in any way interfere with or compete with the proposed business of said A. Company for a period of five years; except that any one of said persons sever connection with said A. Company as provided by paragraph six of said agreement of September 29, 1894." The A. Company brought a bill in equity to restrain H. from competing with it contrary to article 6. The judge found that the instrument had been executed except this article, and had been adopted by the corporations; that the defendant sold his stock in the new corporation, and withdrew from it, contrary to an article in the contract of September 29, to the effect that any one of the three could, in a certain event, sell his stock in the new corporation to the others at a price to be agreed upon or fixed by arbitration; that the defendant had violated and intended to violate article 6 of the contract of October 12; that all the allegations of the bill as to the validity of this article were proved; that, so far as he could find, this article was reasonable and necessary for carrying out the agreement; that the value of the stock of H.'s company was largely dependent upon the keeping of this agreement and the business of the A. Company was of a nature that might extend over the whole country. *Held*, that the stipulation of article 6 of the contract of October 12 was valid. *Anchor Electric Co.* v. *Hawkes*, 101.

RESTRICTION.

Land was conveyed by a deed reciting as follows: "Provided that no building shall ever be erected on said lots of land or either of them within ten feet of the streets as exhibited on said plan." A subsequent deed of the land contained the following clause: "On condition that no building shall ever be erected on said lot within ten feet on said" street "as laid down on said plan." A later conveyance of the land recited that "the premises are sold subject to the condition that no building shall ever be erected on the granted premises within less than ten feet from said street." *Held*, that the clauses in the several deeds were not to be considered as conditions, a breach of which would work a forfeiture, but as restrictions. *Cassidy* v. *Mason*, 507.

RETURN.

See Evidence, 10; Grand Jury.

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REVIEW.

See APPEAL, 2, 3.

REVOCATION.

See WILL, 1–3.

SALE.

Where, at the trial of an action for the price of certain horses sold by the plaintiff to the defendant, there is evidence that after a delivery of some of the horses the defendant paid money to the plaintiff, and the plaintiff gave a receipt for "eleven hundred dollars as a loan and horses to be considered as security when delivered unless sale is made," a request for a ruling that no sale could be shown of earlier date than the writing, and that by the terms of the writing the delivery of the horses was as collateral security, and not in pursuance of a sale, is properly refused. *Allin* v. *Whittemore*, 259.

See EVIDENCE, 2, 12, 14–16; FALSE REPRESENTATIONS; FRAUDS, STATUTE OF, 4; GOODS SOLD; INVENTION, 1; PARTNERSHIP, 3; TRUST AND TRUSTEE, 8, 9.

SCHOOL.

A town which is not obliged by law to maintain a high school, and which has a school of equal grade within its borders, cannot be required, under St. 1894, c. 436, to pay for the tuition of a child of one of its inhabitants in another town, because the parent of the child prefers one school to the other. *Hurlburt* v. *Boxford*, 501.

See MECHANIC'S LIEN, 1.

SERVICE.

See GUARDIAN AND WARD, 2, 3.

SEWER.

It is not necessary to give notice to the party to be charged by a sewer assessment before the same is levied. *Smith* v. *Abington Savings Bank*, 178.

See ATTORNEY AT LAW; ENCUMBRANCE; EVIDENCE, 5, 6; TOWN, 2, 3.

SHERIFF.

See QUIETING TITLE, 2.

SHIPS AND SHIPPING.

At the trial of an action of contract against one of two owners of a vessel to recover for supplies furnished for a fishing voyage, there was evidence that

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the vessel was sailed on a certain lay, by which the master received a commission from the proceeds of the fish caught, after which, subject to certain deductions known as great generals, the balance of the proceeds was divided between the owners and the crew in a fixed proportion; that certain articles selected by the defendant and the captain were bought by the defendant, and others were subsequently bought by the captain in the absence of the defendant; that some payments on account were made by the captain, and others by the manager for the owners; that the defendant urged the plaintiff to get his money out of the captain, and said, "Every dollar that you get out of that captain saves me one"; that according to the understanding between the parties all the articles, with one or two exceptions which were charged to the vessel and owners, were charged to the great generals; and that the plaintiff looked to the owners for his pay. *Held*, that under that lay the master was not owner *pro hac vice*. *Held, also*, that there was evidence that the defendant made himself a debtor for the goods, and that his oral promise to pay therefor was not within the statute of frauds. *Paine* v. *Silva*, 276.

See Employers' Liability Act, 6; Evidence, 21; Insurance, 7.

SIDEWALK.

See Highway.

SIGNATURE.

See Promissory Note.

SPECIFIC PERFORMANCE.

See Deed, 1; Equity, 9; Frauds, Statute of, 2, 3; Waiver, 1.

STATUTE.

See Action, 3, 5, 7; Appeal, 2, 4; Arbitrament and Award; Attorney at Law; Bankruptcy; Beneficiary Association; Constitutional Law; Corporation; Damages, 1, 2; Devise and Legacy, 9; Discontinuance; Elections; Eminent Domain, 2, 3; Employers' Liability Act; Equity, 1, 2; Estates of Persons Deceased, 1, 2; Evidence, 18, 19, 24; Frauds, Statute of; Grand Jury, 1, 2; Interrogatories to Adverse Party; Intoxicating Liquors; Life Estate; Mechanic's Lien, 1; Militia; Negligence, 2–4; Nullity of Marriage; Police Officer; Priority, 2; Quantum Meruit; Quieting Title; Receiver, 2; School; Tax; Town, 1; Trust and Trustee, 8.

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See Frauds, Statute of.

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SUPREME JUDICIAL COURT.

See APPEAL, 4; DECLARATION, 4; EXCEPTIONS.

SURETY.

See ASSIGNMENT, 1.

TAKING.

See EMINENT DOMAIN.

TAX.

1. The donor of a power of appointment, rather than the donee, must be regarded as the decedent whose estate is liable to taxation under St. 1891, c. 425, entitled "An Act imposing a tax on collateral legacies and successions." *Emmons* v. *Shaw*, 410.
2. Under St. 1891, c. 425, entitled "An Act imposing a tax on collateral legacies and successions," the Probate Court has jurisdiction of a petition by the executor of a foreign will proved in this Commonwealth for instructions upon the question whether he is liable to pay a tax upon the property, real and personal, of the testate found herein. *Callahan* v. *Woodbridge*, 595.

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3. The executor of a foreign will proved in this Commonwealth is liable to pay a tax under St. 1891, c. 425, entitled "An Act imposing a tax on collateral legacies and successions," upon the following property of the testate within the jurisdiction of this Commonwealth: real estate, cash on hand, bonds of railroad companies, of cities without the Commonwealth, of other States and of the United States, all of which are transferable by delivery, and are commonly bought and sold in the market in this Commonwealth. But whether a note and mortgage, the maker of the note and the land covered by the mortgage not being within the Commonwealth, are taxable, *quære*. *Callahan* v. *Woodbridge*, 595.
4. For the purpose of determining whether an estate is taxable under St. 1891, c. 425, entitled "An Act imposing a tax on collateral legacies and successions," the words of the proviso at the end of § 1, which declare that no estate shall be subject to the provisions of the act unless its value, "after the payment of all debts," shall exceed the sum of ten thousand dollars, mean that only the debts, and not the expenses of administration, are to be deducted; but for the purpose of determining on what amount the tax is to be computed, expenses of administration must be deducted. *Ibid.*

See Encumbrance; Evidence, 4; Life Estate; Receiver, 2.

TENANT AT SUFFERANCE.

See Landlord and Tenant; Principal and Agent.

TENANTS IN COMMON.

See Deed, 3; Estoppel, 1.

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TITLE.

See Life Estate; Quieting Title.

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See Corporation; Equity, 1.

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TORTS.

See ACTION, 4–7; ATTORNEY AT LAW; CITY; CONFLICT OF LAWS, 2; CONVERSION; DAMAGES; EMPLOYERS' LIABILITY ACT; EQUITY, 3; EVIDENCE, 10, 18-24; FENCE; HIGHWAY; INTERROGATORIES TO ADVERSE PARTY; INTOXICATING LIQUORS; MASTER AND SERVANT; NEGLIGENCE; PASSENGER; POLICE OFFICER.

TOWN.

1. The St. of 1892, c. 216, entitled "An Act to incorporate the town of West Tisbury," requires an equal division of the corporate property. *Tisbury* v. *West Tisbury*, 201.
2. An article in a warrant for a town meeting, "To see what action the town will take in regard to some system of sewerage, and raise and appropriate money for the same," will warrant a vote of the town to borrow money for the construction of the sewer. *Smith* v. *Abington Savings Bank*, 178.
3. A town, under an article in the warrant, "To see what action the town will take in regard to some system of sewerage," adopted the engineer's report, which stated that "the northerly side of B. Hill will drain into the sewer described above through A. Avenue." B. Avenue was situated in this district. *Held*, that the laying out of a sewer on B. Avenue, the course of which through that avenue was indicated by a red line on a plan accompanying the report, was sufficiently definite and certain. *Ibid.*

See ATTORNEY AT LAW; CONSTITUTIONAL LAW, 1; ENCUMBRANCE; EQUITY, 4; EVIDENCE, 5, 6; SCHOOL; TRUST AND TRUSTEE, 6.

TRAVELLER.

See CITY; EVIDENCE, 18, 19; NEGLIGENCE, 3–8.

TRESPASS.

See ATTORNEY AT LAW.

TRIAL.

1. Whether further evidence shall be received upon a point expressly admitted by the adverse party is wholly within the discretion of the justice presiding at the trial. *Whiteside* v. *Lowney*, 431.
2. No exception lies to the refusal of the judge presiding at the trial of an action to withdraw the case from the jury at the close of the evidence for the plaintiff, unless the defendant rests on the same evidence. *Wild* v. *Boston & Maine Railroad*, 245.

See EQUITY, 10, 11; EVIDENCE, 17, 28, 31; EXCEPTIONS, 3; WRIT OF ENTRY, 1.

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TRUST AND TRUSTEE.

1. Where, so far as a declaration of trust goes, nothing can be plainer than the persons for whose benefit the trust is declared, and it is competent for the presiding justice to find on the evidence before him, and for aught that appears he does so find, that the contents of the instrument were known to the settlor and were assented to by him as correctly setting forth the terms of the trust on which the money was paid by him to and was received by the trustee, the contention of a person that the object was to benefit the heirs of A., of whom he was one, and that by ignorance, mistake, or fraud his name was omitted from the list of heirs found in the possession of the settlor, and that the instrument should be reformed so as to admit him as a beneficiary, cannot be maintained. *Richardson* v. *Adams*, 447.
2. The terms of a declaration of trust cannot be varied or affected by statements made by the creator of the trust after it has been executed and carried into effect, and in the absence and without the knowledge or assent of the other parties interested. *Ibid.*
3. This court will not answer a request of a trustee for instructions as to his duties in the future. *White* v. *Massachusetts Institute of Technology*, 84.
4. Where a will contains no devise or bequest to any one as a trustee of the testator's estate, but appoints his brother to be executor and trustee, and the ultimate division which the testator contemplates is not to be made until all the provisions of the will have been carried out, and this will require action on the part of an executor or trustee after the death of the survivor of his widow and his sister, the word "trustee" must be regarded as used not merely as a synonym for "executor," and the brother may be appointed trustee. *Leonard* v. *Haworth*, 496.
5. The obligation of a person to whom a debtor has conveyed property in trust, to repay to the latter the residue of the proceeds of the property after the object of the trust has been accomplished, is not released by the trustee's discharge in insolvency. *Raphael* v. *Mullen*, 111.
6. Under the will of Benjamin Franklin, proved in Philadelphia in 1790, giving a certain sum of money to the inhabitants of the town of Boston in trust, to "be managed under the direction of the selectmen, united with the ministers of the oldest Episcopalian, Congregational, and Presbyterian churches in that town," the city of Boston holds the fund in trust and is the trustee, and the appointment by the Probate Court of certain citizens of Boston as trustees is inoperative and void, and they are not entitled to the possession and control of the fund, as against the city. *Higginson* v. *Turner*, 586.
7. A trust deed was executed by H., providing that, after his death, one third of the net income of the trust property was to be paid to his wife M., and two thirds to his children or their issue, for life; that, if any child died, his portion of the income was to go to the urviving children, unless the child dying left issue, when it was to go to the issue by right of representation; that if all the children and their issue should die, his wife M.,

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if living, was to take the whole income, and if she should die, the children or their issue, if any were living, were to receive the whole income; that on the death of the last survivor of "said wife" and child or children, or within twenty-one years after the death of "said wife and of the child now living," the corpus of the trust was to be conveyed to the children then living and the heirs of such children as had deceased; and that, in the event of the death of "said M. and the child or children of said H." during his lifetime, all the trust property should thereupon be conveyed to H. and the trust should cease. *Held*, that the trust was for the benefit of H., his wife M., and their children, and the issue and heirs of such children, and not for the benefit of another wife of H. or her children. *Thomas* v. *Crosby*, 510.

8. A conveyance in trust was made both to secure and extinguish the debt which it mentioned. It provided that the trust should continue until the debt was extinguished unless the trustee agreed to its revocation by the grantor. In pursuance of this purpose the trustee was given different and more extensive powers than those contained in simple mortgages. The power to sell was not the usual one to sell upon a future default which might or might not happen, but a power forthwith or at any time to convert the property conveyed, or any part of it, into money. It was coupled with a power to exchange, and stood alongside of a power to convert realty into personalty, and personalty into realty; and the proceeds of a partial sale might be used to extinguish encumbrances upon the residue. *Held*, on a bill in equity against the trustee for a reconveyance and that he be enjoined from making any further conveyance, that, while the court assumed for the purposes of argument, although the deed expressly contemplated investments, that upon a sale of the whole it would be the trustee's duty to apply so much of the proceeds as was necessary to the payment of the debt, this fact was not sufficient to bring the power within Pub. Sts. c. 181, § 17, requiring the publication of notice before a sale under an ordinary mortgage power, nor within § 21 of the same chapter; that the trustee had power to bind himself and the trust estate by contract to make any sale which he had power to execute; and that, assuming that the plaintiff had a right to redeem, he must take the fund as he found it, subject to any changes lawfully made by the trustee, including contracts which in equity have the effect of conveyances. *Judge* v. *Pfaff*, 195.

9. A railroad corporation gave a mortgage of its property to trustees to secure the payment of an issue of bonds. This mortgage was subsequently foreclosed, and the property bought in at the sale by a committee acting for a portion of the bondholders, under an agreement and statutory authority. In accordance therewith the corporation was reorganized, and a portion of the former bondholders took preferred stock in the new corporation, in exchange for their bonds in the old corporation. The purchasing committee paid on account a certain sum, which was received and held by the trustees, who, upon a confirmation of the sale by a decree of court, conveyed the property to the committee, who then conveyed it to the new corporation. Coupons to a large amount were in litigation until nine

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years later, when they were all obtained and cancelled. *Held*, that the right to the fund so held by the trustees did not revert to the committee, but passed to the new corporation. *Gray* v. *Central Massachusetts Railroad*, 116.

See DEVISE AND LEGACY, 2, 3; EQUITY, 2, 6; EVIDENCE, 2; EXECUTOR; FRAUDULENT CONVEYANCE; LEASE, 3; POWER.

TRUSTEE PROCESS.

Whatever may be true of the effect of a compulsory assignment, which is valid by the laws of another State where it was made, and which purports to convey to the assignee all the property and effects of a corporation "wheresoever situate" when credits of the assignor are attached in this Commonwealth by inhabitants hereof, there is no good reason why this court should protect, against the rights of the assignee, an attachment made by an inhabitant of still another State after the assignment. *Witters* v. *Globe Savings Bank of Chicago*, 425.

See FRAUDULENT CONVEYANCE.

UNDUE INFLUENCE.

See DECREE, 2.

VERDICT.

See CONVERSION; DECLARATION, 3; EMINENT DOMAIN, 1; EQUITY, 3; MASTER AND SERVANT, 4.

WAGER.

See ACTION, 2.

WAGES.

See EVIDENCE, 20; RECEIVER, 2.

WAIVER.

1. In 1888, the members of a private trading corporation, of whom one was B., who owned four tenths of the stock, executed an agreement, article three of which contained the following: "In the event of B.'s death the remaining stockholders, parties to this agreement, shall have the right to purchase from his estate one half of his stock, within one year from date

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of his death, and the remaining within two years from said date, at a price equivalent to par and proportion of surplus as set forth in the first article of this agreement." By article five B. agreed that, if the other parties requested, he would at the expiration of one year from the receipt of a notice sell to them one third of his "entire holdings of stock" at a price equivalent to par, together with its proportion of surplus, and thereafter upon a similar notice, at the expiration of one year, would sell a further third at a price calculated in a similar manner. Such notice was given in 1890 by the other parties to B., who, at the end of the year, transferred one third of his stock to them. A similar notice was given in 1891, but B. procured from one of the parties a waiver of his right to take any of B.'s stock during 1892, and the project of taking stock for that year was given up. Late in 1891, B. gave a notice to the other parties, requiring them to take all of his stock under article six, which provided that, if he should desire to dispose of his stock, he should first offer it to the other parties at a price equivalent to par and proportion of surplus, and that, if they should neglect or decline for a period of six months after such notice to purchase the shares, B. might sell them to any other persons, or at his option might call upon the other parties to join with him in winding up the corporation. They did not take the stock within six months; and B., who remained a stockholder, died in 1894. *Held*, upon a bill in equity by the other parties against the administrator of B.'s estate, that they were entitled to specific performance of article three; and that the contract applied also to shares obtained by B. after the capital stock was increased subsequently to the agreement. *Jones* v. *Brown*, 318.

2. The members of a private trading corporation, of whom one was B., executed an agreement, which provided that "in the event of B.'s death the remaining stockholders, parties to this agreement, shall have the right to purchase from his estate one half of his stock, within one year from date of his death, and the remaining within two years from said date, at a price equivalent to par and proportion of surplus as set forth in" the agreement. The agreement also provided for a submission to arbitration if any controversy or difference of opinion should arise between the parties or their representatives; and that "neither side shall be entitled to maintain an action at law or suit in equity until the matter in dispute shall have been first referred to and decided by arbitrators." Within a year after B.'s death the other parties notified the administrator of his estate of their election to take all the stock, and made a tender, which was refused. The letter containing the tender stated that, "if you differ with us as to whether the amount tendered is in accordance with the contract, you have only to say so; and we stand ready to submit that difference of opinion to arbitration, under the terms of" the agreement. Three months later, they wrote to him, calling his attention to the fact that they had previously expressed their willingness to submit to arbitration; but he made no answer to this. *Held*, that he had waived the right to have the question submitted to arbitration. *Ibid.*

See CONDITION; ESTATES OF PERSONS DECEASED, 3; INSURANCE, 2, 6; INVENTION, 3; WRIT OF ENTRY, 2, 3.

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WATER AND WATERCOURSE.

See EQUITY, 4.

WATER COMPANY.

A water company incorporated for the purpose of supplying the inhabitants of a town with water, which is authorized "to distribute water through said town and establish and collect rates therefor," has no right to refuse to supply water to the lessee of a house connected with its system on the ground that the owner of the house has not paid the rates for the previous year; and a regulation of the company that "in all cases of non-payment of rates fifteen days after same are due, the water may be shut off without further notice, and not be again turned on until rates are paid," so far as it may be construed as giving such a right, is unreasonable and void. *Turner* v. *Revere Water Co.* 329.

WATERWORKS.

See CITY; DEED, 6, 7.

WAY.

At the trial of a bill in equity, filed May 8, 1897, to enjoin the defendant from building out upon his land beyond the former front of his building on T. Street in Boston about four feet beyond the old line, which was also the line of the other buildings between W. and M. Streets which intersect T. Street, one to the north and the other to the south of the place in question, it appeared that the plaintiff owned the building adjoining the defendant on the M. Street side; that on May 25, 1795, the town voted to sell all or any part of land opposite the Common on what are now T. Street and P. Street, and including the land between W. and M. Streets, "upon express condition that all buildings to be erected on the lands sold by virtue of this vote shall be regular and uniform, and of brick or stone, and covered with slate or tile, or some materials that will resist fire"; that on January 12, 1796, four large lots, including one called lot five, of which the defendant's land is a part, and one called lot six, of which the plaintiff's land is a part, were conveyed under this vote to a person in one deed, in which the condition was repeated in the above words; that the present parties derived their titles through mesne conveyances from this deed; that by 1810, or a little later, there was a continuous line of buildings from W. Street to M. Street, upon a straight line at a slight angle to T. Street, but at an average distance from it of about four feet; and that in and after July, 1877, the house on the defendant's land was altered from a dwelling-house to a shop, the four feet in question being taken into the basement story and covered, at a level with the adjoining sidewalk, with Hyatt lights, made of iron and glass, and adapted at once to light the basement and to serve as a pavement for travel. *Held*, that the

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plaintiff was not entitled to an injunction; that there was no dedication of the four feet as a footway, and that there was no way by prescription. *Hamlen* v. *Keith*, 77.

See CONSTITUTIONAL LAW, 1; HIGHWAY.

WEST TISBURY.

See TOWN, 1.

WIDOW.

See DEVISE AND LEGACY, 2, 4; ESTATES OF PERSONS DECEASED, 8; PERPETUITY.

WILL.

1. The gift of personal effects, etc. by will is revoked by a gift in the codicil of "the remainder of articles, not previously disposed of," these words, as there used and in other portions of the codicil, pointing to a disposition executed by the testator in his lifetime; and articles not so given away are "the remainder of articles, not previously disposed of." *White* v. *Massachusetts Institute of Technology*, 84.
2. A gift by will of "all the rest, residue, and remainder of my estate, real and personal," is revoked by a codicil disposing of all the testator's personal estate, the testator leaving no real estate. *Ibid.*
3. A testatrix, by the fifth section of her will, gave, after the death of her husband, who died first, eighty thousand dollars, "which my father in his will gave me power to dispose of" to certain legatees. By the second section of her first codicil she gave "all estate, real and personal, which I have a right to dispose of by my father's will, or which belongs to me in my own right, which I have not disposed of by my said will," to certain legatees, and stated her intention to dispose of all estate she had a right to dispose of, "whether by the will of my father or which may belong to me." The testatrix left no real estate, and by a second codicil disposed of all her personal estate, except the eighty thousand dollars named in the fifth section of the will. *Held*, that the second section of the first codicil was revoked *pro tanto* by the second codicil. *Ibid.*
4. The word "donors," in a gift by will of personal articles "to the respective persons as donors thereof as presents from me," must be regarded as used by mistake for "donees." *Ibid.*

See ADOPTION, 2; DECREE; DEVISE AND LEGACY; EASEMENT; EQUITY, 2; ESTATES OF PERSONS DECEASED, 3; LIFE ESTATE; PERPETUITY; POWER; TRUST AND TRUSTEE, 4, 6.

WITNESS.

See EVIDENCE, 14, 17, 21, 28–33.

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WORDS.

"Accrued," "accrued claims," and "accrued indebtedness." See *Attorney General* v. *Massachusetts Benefit Life Association*, 193, 194, 195.
"After the payment of all debts." See *Callahan* v. *Woodbridge*, 595, 599.
"After the settlement of an estate." See *Forbes* v. *Harrington*, 386, 393.
"Also all branches, tracks, side-tracks," etc. See *Gray* v. *Central Massachusetts Railroad*, 116, 123, 125.
"Alteration . . . in . . . the location of . . . the highway or town way." See *New England Railroad* v. *Board of Railroad Commissioners*, 135, 137.
"And all personal property and estate owned by said lessor." See *Gray* v. *Central Massachusetts Railroad*, 116, 124.
"Any property, right, title, or interest, legal or equitable." See *Crawford* v. *Langmaid*, 309, 310.
"Assumption of risk." See *Davis* v. *Forbes*, 548, 554, 555, 558.
"Authorized to receive toll." See *Williams* v. *East Wareham, &c. Street Railway*, 61, 63.
"Bequests." See *White* v. *Massachusetts Institute of Technology*, 84, 98.
"Boulevard." See *Howe* v. *Lowell*, 575, 581.
"By order of court, certificate not to issue." See *Tufts* v. *Hancox*, 148, 149.
"Case (The) shall be entered, tried, and determined," etc. See *Derick* v. *Taylor*, 444, 445.
"Casualty insurance." See *Attorney General* v. *Bay State Beneficiary Association*, 455, 457.
"Children." See *Bragg* v. *Carter*, 324, 328.
"Civil action." See *Clarke* v. *Bacall*, 292.
"Cloud on title." See *Gilman* v. *Gilman*, 46, 47.
"Dangerous." See *Fox* v. *Chelsea*, 297, 301.
"Decedent." See *Emmons* v. *Shaw*, 410, 412.
"Defendant owes the plaintiff." See *Hamer* v. *Eldridge*, 250, 251.
"Donors." See *White* v. *Massachusetts Institute of Technology*, 84, 95.
"Due care." See *Hilton* v. *Boston*, 478, 480.
"Duress." See *Silsbee* v. *Webber*, 378, 380, 383.
"For fraud or other cause." See *Smith* v. *Smith*, 404, 405.
"For one dollar and other considerations." See *Lennox* v. *Murphy*, 370, 371.
"Grandchildren." See *Bragg* v. *Carter*, 324, 328.
"Grand jury (The) for H. County shall assemble at the terms of court hereby established." See *Commonwealth* v. *Krathofski*, 459.
"Gross and confirmed habits of intoxication." See *McCraw* v. *McCraw*, 146, 147.
"Gross negligence." See *Morey* v. *Gloucester Street Railway*, 164, 165.
"Ground rents." See *Gage* v. *Wood*, 465, 467.
"I." See *Sercombe-Bolte Manuf. Co.* v. *John P. Lovell Arms Co.* 175, 177.
"If living at my decease." See *White* v. *Massachusetts Institute of Technology*, 84, 97.
"If secured within the time named." See *Newton Rubber Works* v. *Graham*, 352, 353.

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"Immediate written notice." See *Smith & Dove Manuf. Co.* v. *Travelers' Ins. Co.* 357, 358.
"Including." See *Gray* v. *Central Massachusetts Railroad*, 116, 124, 125.
"In part on a court." See *Baker* v. *Willard*, 220, 226.
"Is or may beome justly due." See *Forbes* v. *Harrington*, 386, 389.
"Issue." See *Bragg* v. *Carter*, 324, 328.
"It is further agreed that any question arising under this contract shall be determined by the law of." See *Brockway* v. *American Express Co.* 158, 161.
"It is understood that James D. is to have No. 70, and Ellen and Eliza No. 72 in said cottage." See *Dallagher* v. *Dallagher*, 503, 504.
"Land, water rights, rights of way, and easements." See *Drury* v. *Butler*, 171, 174.
"Legacy." See *White* v. *Massachusetts Institute of Technology*, 84, 98.
"Liable to parties aggrieved." See *Healey* v. *Lothrop*, 263, 264.
"Locomotive engine or train upon a railroad." See *Fallon* v. *West End Street Railway*, 249.
"Manual labor." See *Riou* v. *Rockport Granite Co.* 162, 164.
"My." See *Sercombe-Bolte Manuf. Co.* v. *John P. Lovell Arms Co.* 175, 177.
"Nearest of kin." See *Leonard* v. *Haworth*, 496, 500.
"No expectant estate shall be defeated or barred by an alienation or other act," etc. See *Ritchie* v. *Ritchie*, 504, 506.
"Northerly side (The) of Beachmont Hill will drain into the sewer described above," etc. See *Smith* v. *Abington Savings Bank*, 178, 185.
"Notice." See *Gately* v. *Old Colony Railroad*, 494, 495.
"Not previously disposed of." See *White* v. *Massachusetts Institute of Technology*, 84, 95.
"On obligations contracted and to be contracted." See *Lennox* v. *Murphy*, 370.
"Owes." See *Hamer* v. *Eldridge*, 250, 251.
"Passenger." See *Young* v. *New York, New Haven, & Hartford Railroad*, 33, 35; *Copson* v. *Same*, 233.
"Persons." See *Whippen* v. *Whippen*, 560, 563.
"Plaintiff has done and performed all things . . ., and has kept all the conditions of said agreement." See *Newton Rubber Works* v. *Graham*, 352, 353.
"Possibility of an adverse claim." See *Gilman* v. *Gilman*, 46, 48.
"Property." See *Gray* v. *Central Massachusetts Railroad*, 116, 125; *Bennett* v. *Sweet*, 600, 601.
"Railroad." See *Fallon* v. *West End Street Railway*, 249.
"Ratify the doings of the selectmen in levying the sewer assessment of seventy per cent," etc. See *Smith* v. *Abington Savings Bank*, 178, 186.
"Regular and uniform." See *Hamlen* v. *Keith*, 77, 79.
"Remainder (The) of articles, not previously disposed of." See *White* v. *Massachusetts Institute of Technology*, 84, 95.
"Remembered by a legacy." See *White* v. *Massachusetts Institute of Technology*, 84, 98.

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"Right (The) of passage to and from the rear of said lot through P. Place." See *Baker* v. *Willard*, 220, 227.
"Shall be a condition precedent to any right of action in law or equity." See *Lamson Consolidated Store Service Co.* v. *Prudential Fire Ins. Co.* 433, 434.
"So far as relate to the receiving of toll." See *Williams* v. *East Wareham, &c. Street Railway*, 61, 63.
"Specific insurance." See *Peabody* v. *Liverpool & London & Globe Ins. Co.* 114, 115.
"Still remains unsettled." See *Forbes* v. *Harrington*, 386, 394.
"Stock (The) of the deceased." See *Jones* v. *Brown*, 318, 322.
"Superintendence." See *O'Brien* v. *Look*, 36; *Riou* v. *Rockport Granite Co.* 162, 164; *Fleming* v. *Elston*, 187, 188; *Cavagnaro* v. *Clark*, 359, 365; *Flynn* v. *Boston Electric Light Co.* 395, 398; *Gunn* v. *New York, New Haven, & Hartford Railroad*, 417, 422.
"Taken." See *Doon* v. *Natick*, 228, 230.
"Tangible or intangible." See *Callahan* v. *Woodbridge*, 595, 598.
"That the location . . . of the highway or town way shall be changed." See *New England Railroad* v. *Board of Railroad Commissioners*, 135, 137.
"Then." See *Jones* v. *Brown*, 318, 322.
"Threat." See *Silsbee* v. *Webber*, 378, 380, 383.
"To be occupied by a building erected thereon by said R." See *Ryder* v. *Faxon*, 206, 207.
"To each of my cousins in the first degree." See *White* v. *Massachusetts Institute of Technology*, 84, 98.
"To equalize the value of corporate property." See *Tisbury* v. *West Tisbury*, 201, 203.
"To such of the said four persons . . . as may be living at the time of payment, and to the lawful issue then living of any my child who has then deceased," etc. See *Hemenway* v. *Hemenway*, 42, 45.
"To the full end of the term of the agreement." See *Poole* v. *Massachusetts Mohair Plush Co.* 49, 51, 52.
"To the same extent." See *Healey* v. *Lothrop*, 263, 264.
"Trustee." See *Leonard* v. *Haworth*, 496, 498.
"Trustees (The) shall take such time, not exceeding three years from the death of ———, as they may think best." See *Loring* v. *Massachusetts Horticultural Society*, 401, 403.
"Two leading political parties." See *Jaquith* v. *Wellesley*, 138, 143.
"Upon and after the death of ———, then in trust to hold the said trust property to the use of the appointees." See *Loring* v. *Massachusetts Horticultural Society*, 401, 403.
"Upon express condition that all buildings," etc. See *Hamlen* v. *Keith*, 77, 78, 79.
"Ways, works, or machinery." See *Gunn* v. *New York, New Haven, & Hartford Railroad*, 417, 422.
"When my wife has deceased and her funeral expenses have been paid and all the provisions named in this will have been carried out, I will what

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is left of my estate be devided among my nearest of kin." See *Leonard* v. *Haworth*, 496, 500.

"Wheresoever situate." See *Witters* v. *Globe Savings Bank of Chicago*, 425, 426.

"Which shall pass by will or by the laws of the Commonwealth regulating intestate succession." See *Callahan* v. *Woodbridge*, 595, 597.

"With the understanding." See *Lennox* v. *Murphy*, 370, 372.

WRIT OF CERTIORARI.

See MILITIA.

WRIT OF ENTRY.

1. At the trial of a writ of entry to recover land conveyed to a city upon the conditions that a portion of it should be laid out as a highway and the remainder used as a park or boulevard, and that a failure to do either should work a forfeiture, it is within the power of the judge to allow an amendment of the description of the land contained in the writ, which did not include the part laid out as a highway, so as to include all the land described in the deed. *Howe* v. *Lowell*, 575.
2. If the judge presiding at the trial of a writ of entry to recover land alleged to have been forfeited rules that, on the facts found, there was no waiver by or estoppel against the demandant, whether this is a ruling of law or a finding of fact, it is to be sustained, unless the facts found, as matter of law, require a different ruling or finding; and on the facts before it in the present case, this court cannot say that the rulings or findings upon this part of the case are erroneous. *Ibid.*
3. If land is conveyed to a city upon the conditions that a portion of it shall be laid out as a highway and the remainder used as a park or boulevard, and that a failure to do either shall work a forfeiture, the bringing of a writ of entry to recover the land, the description of which does not include the part laid out as a highway, and which is cured afterwards by an amendment containing such description, is not a waiver of the breach of the conditions in the deed. *Ibid.*

WRIT OF ERROR.

Where the defendant in the original action was not misled by the mistake in the date of the original summons, which was duly served, and he had full opportunity to appear and defend the action, and where no error appears in the record itself and the defect was one which might have been amended if the attention of the court had been called to it, but the defendant lay by and made no defence, although he was aware of the pendency of the action, he cannot be heard by writ of error, and he ought not to be heard in any form of proceeding to contest the validity of the service and judgment. *Bishop* v. *Donnell*, 563.

See GUARDIAN AND WARD, 1.

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WRIT OF REVIEW.

See APPEAL, 2, 3.

WRITTEN INSTRUMENTS.

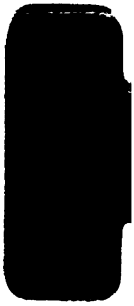
See CHECK; CONTRACT, 3; DECLARATION; DEED; ENCUMBRANCE; EVIDENCE, 1–6, 11, 13; FRAUDS, STATUTE OF; INSURANCE; LEASE; MORTGAGE; POWER; PROMISSORY NOTE; QUIETING TITLE, 2; RESTRICTION; SALE; TRUST AND TRUSTEE, 1, 2, 4, 6–9; TRUSTEE PROCESS; WILL.

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